APPENDIX NO. 3

Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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SECTION 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE, Appellant-Plaintiff,	)	
-vs-	)	No. 74-1211
HONORABLE RICHARD KNEIP, et al., Appellee-Defendant.	)	

Appeal from a judgment of the United States District Court for the District of South Dakota declaring that Congress disestablished three-fourths of the Rosebud Indian Reservation

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BRIEF FOR APPELLANT-PLAINTIFF

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May 1974

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IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE, Appellant-Plaintiff, -vs- HONORABLE RICHARD KNEIP, et al., Appellee-Defendant.	)	No. 74-1211

Appeal from a judgment of the United States District Court for the District of South Dakota declaring that Congress disestablished three-fourths of the Rosebud Indian Reservation

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BRIEF FOR APPELLANT-PLAINTIFF

Jurisdictional Statement

The jurisdiction of the district court was invoked under 28 U.S.C. 1362. The judgment below was entered February 15, 1974. (App. I, p. 81.) [1/] The notice of appeal was filed March 13, 1974. (App. I, p. 82.) The jurisdiction of this Court is invoked under 28 U.S.C. 1291. The opinion of the court below appears in Appendix I at pages 27 through 80.

1/ Appendix I, hereinafter cited "App. I, p. ___" includes the portions of this record designated pursuant to Rule 30(b) F.R.App.P. Appendices II, III, IV (hereinafter cited e.g., "App. II, Doc. ___"), are appendices to the brief and include copies of Congressional materials and official documents, mainly from the National Archives.

Statement of the Issue for Review

Whether any of the Acts of April 23, 1904, c. 1484, 33 Stat. 254; March 2, 1907, c. 2536, 34 Stat. 1230; and May 30, 1910, c. 260, 36 Stat. 448, providing for the disposal of unallotted tribal land, disestablished any part of the Rosebud Sioux Indian Reservation as defined in the Act of March 2, 1889, c. 405, 25 Stat. 888?

Statutes Involved

The full text of the three statutes cited in the statement of the issue for review is set out at the end of this brief at pages 60-71, infra.

Statement of the Case

This is an appeal from a declaratory judgment of the United States District Court for the District of South Dakota (Honorable Andrew W. Bogue) holding that Congress disestablished about three-fourths of the Rosebud Sioux Indian Reservation through three statutes enacted in 1904, 1907, and 1910, providing for the disposal of unallotted tribal land.

The reservation status of the Rosebud reservation turns on the meaning and effect of those three statutes. But that meaning and effect takes life only in the context of the history of the reservation. The Sioux landholdings had

early beginnings, but we commence with the famous Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749, where the United States defined and recognized the countries of seven Indian nations including a portion of the country of the Sioux Nation, extending from the Missouri River to the Rocky Mountains.[2/]

Increasing emigration through Sioux country generated hostilities culminating in the Treaty of April 29, 1868, 15 Stat. 635, between the United States and the Sioux.[3/] Article 2 of that treaty established the Great Sioux Reservation embracing all of South Dakota west of the Missouri River and a thin slice of North Dakota.[4/] In the same article the Sioux ceded their country outside of the Great Sioux reservation, retaining hunting and other rights in the ceded area.

In the 1868 Treaty the United States made three solemn promises that have bearing here. First, that the Great Sioux Reservation was "set apart for the absolute and undisturbed use and occupation" of the Sioux (Article 2). Second, that no one other than the Sioux and authorized Federal personnel "shall ever be permitted to pass over, settle upon, or reside" on the reservation (Article 2).

2/ For a general history of the 1851 Treaty see Crow Tribe v. United States, 151 Ct. Cl. 281 (1960), certiorari denied 366 U.S. 294; Sioux Tribe v. United States, 97 Ct. Cl. 613, Fdg. 1, 616-619 (1942), certiorari denied 318 U.S. 789. For a definition of the Sioux country delimited in the 1851 Treaty, see Sioux Nation v. United States, 15 Ind. Cl. Comm. 577 (1965), modified 21 Ind. Cl. Comm. 371 (1969).

3/ Sioux Tribe v. United States, 97 Ct. Cl. 613, Fdgs. 2, 3, 4, pp. 619-627 (1942), certiorari denied 318 U.S. 789.

4/ Cession Nos. 598, 632, Dakota 1, Indian Land Cessions, 18th Annual Report, Bureau of American Ethnology (GPO 1899), generally known as Royce Land Cessions.

Third, that no cession "of any portion or part of the reservation *** shall be of any validity *** unless executed and signed by at least three-fourths of all the adult male Indians" occupying the reservation (Article 12). None of these promises was kept.

The famous Black Hills country of South Dakota located in the western portion of the Great Sioux Reservation was early coveted for its known gold value. Faced with the Sioux refusal to consent to sale by three-fourths of the male adults as required by Article 12 of the 1868 Treaty, Congress abrogated the Sioux rights outside the Great Sioux Reservation and unilaterally took the Black Hills area, about one-fourth of the reservation, without the consent of the Sioux. Act of February 28, 1877, c. 72, 19 Stat. 254.[5/] This left about 18 million acres in the reservation.

The process of attrition continued. In 1889 about half of the diminished Great Sioux Reservation was divided into six smaller reservations.[6/] With specified exceptions, the estimated 9.2 million acres[7/] outside of the six reservations were explicitly "restored to the public domain" to be sold at prescribed prices

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5/ Sioux Tribe v. United States, 146 F.Supp. 229 (1956) not in the official Court of Claims reports because the decision was vacated and the case remanded for new trial for reasons not pertinent here. An account of the post-decision proceedings appears in 182 Ct. Cl. 912-913 (1968). A history of this phase is set out in some detail in Sioux Tribe v. United States, 33 Ind. Cl. Comm. 151, 159-163 (1974) where the Indian Claims Commission held that the 1877 Act constituted a taking under the Fifth Amendment (idem, 218).

6/ The Santee Sioux reservation in Nebraska was not carved out of the Great Sioux Reservation. At the time of the 1889 Act the Santee Sioux already possessed a reservation in Nebraska. Act of March 2, 1889, supra, sec. 7.

7/ Acreage from Sioux Tribe v. United States, 105 Ct. Cl. 658, 710 (1946).

with the net proceeds credited to the Sioux. Act of March 2, 1889, c. 405, secs. 1-6, 21, 22, 25 Stat. 888 (referred to by the Indians as "General Crooks Treaty"). Section 19 continued in force all the provisions of the 1868 Treaty. The 1889 Act was executed and signed by at least three-fourths of the male adult Sioux, as required by Article 12 of the 1868 Treaty, reaffirmed by Section 28 of the 1889 Act, and spelled out in the President's Proclamation of February 10, 1890 (26 Stat. 1554), confirming the Indian approval of the 1889 Act. One of the six smaller reservations defined in the 1889 Act was Rosebud, "set apart for a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency."

The 1889 Act (secs. 8-11) directed that allotments of reservation lands be made to each Indian man, woman, and child, within each of the six reservations. The Act also authorized the Secretary to negotiate within each reservation for the purchase of such unallotted land as the tribe shall "consent to sell" (sec. 12).

Commencing with Rosebud in 1904 and continuing until 1910, the United States, without the required "consent to sell", unilaterally opened to settlement the unallotted tribal land on five of the six reservations. This was

accomplished through eight statutes,[8] often termed "surplus" land statutes because the Government referred to the land as "surplus" to the Indians' needs. In no instance did the Tribe sell and the United States buy the tribal land. In no instance was the land restored to the public domain. In no instance did three-fourths of the Sioux male adults consent as required by Article 12 of the 1868 Treaty and section 28 of the 1889 Act.

Three of the eight surplus land statutes related to the Rosebud reservation. As delimited in the 1889 Act, the Rosebud reservation contained 3,228,160 acres (1 Kappler 1041), embracing all of present day Todd, Mellette and Tripp counties, most of Gregory and a few townships in Lyman county. The three Rosebud "surplus" land statutes affected 2, 442,318 acres covering three-fourths

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8/ a. Rosebud: Act of April 23, 1904, c. 1484, 33 Stat. 254, affecting tribal reservation lands in Gregory and Lyman counties; Act of March 2, 1907, c. 2536, 34 Stat. 1230, affecting tribal reservation lands in Tripp County; and Act of May 30, 1910, c. 260, 36 Stat. 448, affecting tribal reservation lands in Mellette and Washabaugh counties. (The county lines were redefined in 1911 so that the reservation lands in Washabaugh fell into Mellette county. S.D. Session Laws, 1911, c. 108, sec. 2.

b. Pine Ridge: Act of May 27, 1910, c. 257, 36 Stat. 440, affecting tribal reservation lands in Bennett County.

c. Cheyenne River: Act of May 29, 1908, c. 218, 35 Stat. 460, affecting tribal reservation lands.

d. Standing Rock: Act of May 29, 1908, supra, and Act of February 14, 1913, c. 54, 37 Stat. 675 affecting tribal reservation lands in North Dakota and South Dakota.

e. Lower Brule: Act of April 21, 1906, c. 1645, 34 Stat. 124, affecting tribal reservation lands.

f. Crow Creek: No comparable statute since the initial reservation was so small.

of the Rosebud reservation, -- all but the portion in Todd county. GAO report, pp. 1619, 1653, 1707-08. (App. IV, Doc. 55.)[9]

By 1901, 4508 allotments had been made pursuant to sections 8-11 of the 1889 Act. The allotments were spread throughout the Rosebud reservation[10] and 4917 Indians were living in all of the present day counties and portions of counties within the reservation.[11] CIA, 1901, p. 371. (App. IV, Doc. 40A.) In 1901 the United States negotiated an agreement for the voluntary sale by the Tribe of 416,000 acres of unallotted reservation lands in Gregory county for $1,040,000. The Indians consented by the requisite three-fourths majority of the male adults. Agreement of September 14, 1901, printed in Sen. Doc. 31, 57th Cong., 1st sess. (1901). (App. II, Doc. 3, p. 28.) But Congress never ratified the sale. (App. I, op. 34.) Instead, by the 1904 Act, and twice again by the 1907 Act and the 1910 Act (p. 6, fn. 8, supra), Congress unilaterally, without the consent of the Tribe, directed that unallotted lands identified in those acts, be disposed of under the homestead and townsite laws at the prescribed prices, with the proceeds to be credited to the Tribe.

9/ "GAO" - General Accounting Office reports furnished by the Comptroller General to the Court of Claims in connection with Indian claims cases before the court. Area of Rosebud Reservation in Gregory county - 521,512.56 acres (p. 1619); in Tripp county -- 1,083,680.11 acres (p. 1653); and in Mellette county -- 837,125.78 acres (p. 1707). Total -- 2,442,318 acres.

10/ A copy of an early, large official map found in the National Archives showing the location of the allotments will be available, with the consent of the Court, at oral argument.

11/ "CIA" - Report of the Commissioner of Indian Affairs.

In addition to the 4508 allotments made up to 1901, allotments continued to be made in the areas affected by the three Rosebud statutes until the dates the President proclaimed the "surplus" lands open for disposal in 1904, 1908, and 1911, respectively.[12/] Consequently, when the lands were ultimately opened, the nonIndian homesteaders found the Indian allottees already in the area. Over the years, this intermixture also led to conflicts when the State and its political subdivisions, in derogation of tribal and Federal law, undertook to subject reservation Indians to State law. (App. I, op. 28.) To resolve these problems, this suit was instituted in the name of the Tribe by legal assistance lawyers acting without an approved contract under 25 U.S.C. 81 et seq.

The complaint, as amended, named as defendants, the four counties (Gregory, Lyman, Tripp, Mellette), the Governor and the Attorney General of South Dakota. Later the United States was joined as a defendant. (App. I, caption docket entries; docket entry, 1/11/73.) The amended complaint charged that the State of South Dakota and the counties were exercising jurisdiction over Indians on those portions of the reservation within the four counties. The Tribe asked for a judgment declaring in effect that the boundaries of the reservation as fixed by the 1889 Act, were not affected by the three "surplus" land statutes of 1904, 1907, and 1910. (App. I, pp. 9-10.)

12/ Proclamations of May 13, 1904 (32 L.D. 622); August 24, 1908 (37 L.D. 122); and June 29, 1911 (40 L.D. 164). Up to June 30, 1926, a total of 8,574 allotments had been made on Rosebud to Indians of the Rosebud reservation. GAO report, Vol. I, p. 263, Court of Claims No. C-531 (1934). (App. IV, Doc. 54.)

The answer of the United States preserved its defense of sovereign immunity, but otherwise agreed with the substantive claim of the Tribe. (App. I, p. 26.)

The defendants' answers admitted that State jurisdiction was being exercised over Indians within the counties as charged in the amended complaint, but defended on the ground that such territory was not within the exterior boundaries of the Rosebud reservation. (App. I, pp. 10-24.)

The Tribe through the legal assistance lawyers, argued to the district court that there was no controlling distinction between the three "surplus" land statutes affecting Rosebud, and the "surplus" land statutes construed not to disestablish the reservations in Seymour v. Superintendent, 368 U.S. 351 (1962); City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972); United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973); and State v. Molash, 199 N.W.2d 591 (S.D. 1972).

The defendant Attorney General of South Dakota filed a separate brief attacking the validity of this Court's construction of "surplus" land statutes, similar to Rosebud's, in City of New Town and Erickson, supra. The defendant Attorney General suggested that this Court "would appear to be in substantial conflict as to its interpretation of the legislative history of the Rosebud and similar Acts" and therefore the trial court was free to "make an independent evaluation of the legislative history of the Rosebud Acts ***." (p. 8 of trial brief for defendant Attorney General, reproduced in Appendix IV, Doc. 57).

The defendant four counties, referring to Seymour, New Town, Erickson, and Molash, as "recent decisions", argued that those recent decisions should not be followed because they were based on an inadequate legislative and historical review.[13] In fact, the four counties told the trial court that it was:

> "*** the first court to have the opportunity of deciding the issue in its proper historical perspective and in light of the legislative history available --
>
> * * * * * * * *
>
> Because at the time the recent decisions were made, not one of the courts involved was presented with either the legislative and historical origins of this particular form of reservation legislation or the legislative history of the particular act under consideration." (emphasis in original.) [14]

The trial court briefs of the defendant four counties were heavily interlarded with selected excerpts from documentary material in support of their argument that Congress intended to disestablish the portions of the reservation affected

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13/ The four counties told the trial court "*** that none of these [recent] decisions has been made in light of either an adequate legislative history of the particular act under consideration or the historical origin of the acts in general. As a result, the recent decisions have accepted a proposition similar to plaintiff's position that the acts 'were not expressions of Congressional intent to diminish or alter the boundaries of the Rosebud Reservation'." The full text appears on page 1 of the four counties brief reproduced in Appendix IV, Doc. 58.

On page 48, fn. 24 of the same brief, the four counties observed that they could not find legislative materials, which they deemed pertinent, in the Supreme Court briefs in Seymour, and implied that the Supreme Court must have decided Seymour without adequate legislative history. The full text of page 48 of the four counties' brief below is reproduced in App. IV, Doc. 58.

14/ Four counties brief below, page 45, reproduced in Appendix IV, Doc. 58.

by each of the three surplus land statutes of 1904, 1907 and 1910. Despite the four counties' charge that the Supreme Court, this Court and the Supreme Court of South Dakota rested their decisions in the "recent" cases on inadequate legislative and historical review, the four counties did not place in the record, or furnish as appendices to their briefs below, the documents that they say make their case.

The district court ruled against the Tribe. In an extensive opinion (53 pages), the court recognized the principle that Indian statutes must be liberally construed with all doubt resolved in favor of the Indians, and the guidelines controlling the construction of the three Rosebud statutes. The court expressed awareness that its decision would have "great political, social, cultural and economic effects." (App. I, op. 30-36, 78.) Nevertheless, the court was convinced that the "surrounding legislative history and circumstances clearly indicate a Congressional intent [manifested by the three Rosebud statutes] to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or 'Indian land' nature of those counties thereafter." (App. I, op. 75.) This conviction, based on the premise that the surplus land statutes extinguished Indian title and restored the land to the public domain, is the basis for the district court's judgment, declaring that the 1904, 1907, and 1910 Acts "did extinguish the reservation or 'Indian land' nature of the unallotted surplus lands in said counties by returning them to the

public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to coincide with the boundaries of Todd County, South Dakota." (App. I, p. 82.)

This appeal followed.

Argument

I. The controlling principles of law constrain against disestablishment of an Indian reservation.

The law is established that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." United States v. Celestine, 215 U.S. 278, 285 (1909), most recently quoted with approval in Mattz v. Arnett, ___ U.S. ____, 37 L.ed.2d 92, 106 (1973). "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, ubi supra. This Court recently has twice defined the principles and guidelines governing the determination of whether an act of Congress destroyed or dissolved or terminated the reservation status. City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (C.A. 8, 1972); United States ex rel. Feather v. Erickson, 489 F.2d 99, 101 (C.A. 8, 1973), petition for a writ of certiorari filed April 8, 1974 (42 U.S.L.W. 3595).

One of the effects of disestablishing the reservation is to destroy its status as Indian country as defined in 18 U.S.C. 1151, to eliminate tribal and Federal jurisdiction, to subject the Indians to the loss of Federal and tribal benefits available only to reservation Indians, and to expose the Indian people to state laws, state taxes, state police, state courts and state officials. Unfortunately, attitudes of hostility and discrimination were in full flow when the three Rosebud statutes were enacted. Indeed, these attitudes evoked expressions of judicial concern for the Nation's tribal wards, such as are found in United States v. Kagama, 118 U.S. 375, 383-384 (1886), and similar cases.

The effect of disestablishment and the nature of the controlling guidelines make clear that these are not cases where the court will strain to terminate reservation status. The search should not be for the remote, or the stretch for the obtuse. Even where the question is close, and here it is not, "a holding favoring federal jurisdiction is required unless Congress has expressly or by clear implication diminished the boundaries of the reservation opened to settlement". (emphasis in original.) United States v. Erickson, 478 F.2d 684, 689 (C.A. 8, 1973) quoted with approval in Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 106, n. 23 (1973). Guided by these principles, we turn to the issue of whether any of the three Rosebud "surplus land" statutes express a Congressional determination to terminate. Resolution of that issue calls for examination of the purposes and language of the statutes, their history and background.

II. The three Rosebud statutes did not disestablish any part of the Rosebud reservation.

A. The purpose of the statutes did not require alteration of the reservation boundaries. The prime purpose of the three statutes was to make reservation land available for settlement and in this fashion carry out the Federal policy of planting among the Indians the "civilizing" influence of the white man. The statutes were designed to bring to the allottees among whom the homesteaders would settle, the opportunity to learn from their white neighbors how to be farmers and stockmen. See Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 101-102 (1973).

Thus, with reference to the bill that became the 1904 Act without the Indians' consent, the House Committee on Indian Affairs reported that opening the Gregory county lands to settlement "will enhance very materially the value of the 452 Indian allotments which are within the area proposed to be ceded, and it will also bring the Indians into contact with their white brothers, and give them the benefit of learning how to farm and raise stock from actual observation, and it will tend to make them more self supporting ***." H. Rept. 443, 58th Cong., 2d sess., p. 3 (January 21, 1904). (App. II, Doc. 14.)[15/] The Senate Committee on Indian Affairs, adopted as its report the House report. S. Rept. 651, 58th Cong., 2d sess. (February 4, 1904), reprinted in full in 38 Cong. Rec. 4985-88, April 18, 1904. (App. II, Doc. 16.)

15/ Similar language is found in 45 Cong. Rec. 5457 (April 27, 1910), (App. III, Doc. 33), quoted in the opinion below, App. I, op. 66.)

As in Seymour v. Superintendent, 368 U.S. 351, 356 (1962), the Rosebud statutes "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Thus we see, that to accomplish the objective of the three Rosebud acts, it was not necessary to destroy the reservation status, or to alter the boundaries, delimiting "a permanent reservation" solemnly secured to the Indians by the 1868 Treaty for their "absolute and undisturbed use and occupation."

The district court did not adopt this view of statutory construction.

B. The language of the three statutes rejects disestablishment of any part of the reservation. The construction of the Rosebud statutes is controlled by "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Also, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Peoria Tribe v. United States, 390 U.S. 468, 472-473 (1968); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354 (1941); United States v. Celestine, 215 U.S. 278, 290 (1909).

The canons of construction are but tools to carry out the predicate of the Supreme Court decisions, that the duties owed by the United States to Indian tribes with which it deals are to "be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297. "These Indian tribes are the wards of the Nation." United States v. Kagama, 118 U.S. 375, 383. (Emphasis in original.) "*** the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness." United States v. Payne, 264 U.S. 446, 448. "The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." Choctaw Nation v. United States, 119 U.S. 1, 28 (1886). (emphasis in original.)

These broad and humane principles invoke the highest standards of honor and morality fitting to the situation where the guardian deals for the land of its unprotected and trusting ward. They take on double significance, where, as here, the United States represents conflicting interests -- the fiduciary relationship of the voteless Indian whose land it held in trust, versus the non-Indian citizens who demanded the reservation lands for settlement. "That no man can serve two masters is gospel as well as law. There can be no halfway ground. ***." Ottawa Tribe v. United States, 166 Ct. Cl. 373, 379 (1964), certiorari denied 379 U.S. 929. In the context of these precepts we examine the language and administrative construction of the three Rosebud statutes.

1. There is no language of disestablishment. As pointed out by the Supreme Court "Congress has used clear language of express termination when that result is desired." Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 106, fn. 22 (1973), listing examples. Nothing on the face of the three Rosebud statutes expressly disestablishes any part of the reservation, or purports to alter the reservation boundaries. Not one word in any of the three statutes expresses the clear intent essential to ascribe to Congress the intent to wipe out the reservation status and leave hundreds of Indians residing in the affected areas outside of the reservation and subject to the jurisdiction of the State. Indeed, there are no controlling language differences between the three Rosebud statutes and the statutes adjudicated not to have disestablished the reservations they affected. Seymour v. Superintendent, 368 U.S. 351 (1962); City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972); United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973).

a. The language of the three Rosebud acts. The substance of all three statutes is the same. All three, without the consent of the Indians, unilaterally directed the disposal of the land with the United States acting as trustee to sell the land and credit the proceeds to the Tribe. Only the format, but not the substance, of the 1904 Act differs from the 1907 and 1910 Acts. The portion of the opening section of the 1904 Act preceding the enactment clause, sets out pro haec verba the six articles of the unratified agreement of September 14, 1901 to sell 416,000 acres of Gregory county land for $1,040,000. It is followed by the

Congressional version of the same agreement as unilaterally amended, including omission of the sixth article which called for ratification by Congress. (See page 7, supra.) The format was a camouflage, -- a pretense to give the statute the face of an agreed transaction. In fact, all three statutes simply directed the Secretary to open the land for settlement and credit the proceeds to the Tribe, after first granting the school sections to the State and making minor reservations. (See p. 34, infra.)

(1) The United States not a purchaser. All three statutes affirmatively spelled out that except for the school lands, the United States was not buying the land or guaranteeing to find purchasers, but was simply acting "as trustee for said Indians to dispose of said lands to expend and pay over the proceeds received from the sale thereof only as received ***." (1904 -- sec. 6; 1907 -- sec. 8; 1910 -- sec. 11.) The district court did not discuss or attempt to reconcile its conclusion of disestablishment with the Government's disavowal of purchase.

(2) Deposit of proceeds to the Tribe's credit. All three statutes directed that the proceeds of disposal be deposited in the Treasury to the credit of the Indians belonging and having tribal rights on the Rosebud reservation. (1904 -- sec. 3; 1907 -- sec. 5; 1910 -- sec. 7.) If the trial court is right and each statute terminated a portion of the reservation, the Indians in the disestablished portion would not share in the benefits of those moneys since they would no longer be "Indians belonging to and having tribal rights on the Rosebud Reservation."

While the district court was aware that this was the effect of its holding, it considered that such was the Congressional intent. (App. I, op. 71.) The district court makes no reference to the statutory mandate that the proceeds of disposal be credited to the Tribe, although the Supreme Court cases holding that surplus land statutes do not extinguish title rest on this feature. (The Supreme Court decisions are discussed at pages 36-40, infra.)

(3) Treaty benefits. All three statutes specified "that nothing in this agreement [Act] shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." (1904 -- sec. 1, Art. 5; 1907 and 1910 Acts -- last proviso.)

One of the treaty benefits was the right to a defined reservation. That right was initiated in Article 2 of the Treaty of April 29, 1868, supra, establishing the Great Sioux Reservation, "for the absolute and undisturbed use and occupation of the Indians ***" from which the 1889 Act carved Rosebud "for a permanent reservation". Section 2 of the 1889 Act resecured to the Rosebud Indians "all the title and interest of every name and nature secured" by the Treaty of 1868. We see then that each of the three statutes expressly preserved to the Rosebud Tribe its right to the reservation as defined, secured, and resecured in the 1868 Treaty and 1889 Act.

Contemporaneous with the 1904 Act, the estimated 500 Indians with 452 allotments in the Gregory county portion of the reservation were "Indians of the Rosebud Reservation" protected by the treaty benefit language set out in the

last article of section 1 of the 1904 Act. Similarly, the 500 Indians and 2600 allottees in the Tripp county portion of the reservation, and the 1400 Indians and 4230 allottees in the Mellette county portion of the reservation, were correspondingly protected by the same language in the last proviso of the 1907 and 1910 Acts.[16/]

The treaty benefit language precludes the notion that Congress, at one and the same time, renewed treaty promises to maintain the reservation, and altered the reservation boundaries so as to strip the reservation Indians of their Federal and tribal rights to be free of State jurisdiction. To disestablish or dissolve the reservation status is to read the benefit provisions out of the three statutes.

Although the identical treaty benefit language was deemed significant by this Court in City of New Town, North Dakota v. United States, 454 F.2d 121, (C.A. 8, 1972), the court below made no reference to that language in its opinion. In New Town this Court pointed out that a Congressional intent to abrogate treaty rights is not to be lightly imputed to Congress; that the right to a reservation was preserved,there by an 1886 agreement, here by the 1868 Treaty and the 1889 Act; and that the right to have the reservation boundaries remain undiminished is specifically recognized by the treaty benefit provisions of the three Rosebud acts just as it was in the Fort Berthold 1910 Act.

16/ The number of allotments and the Indian population by counties are based on a 1913 report by the Superintendant, Rosebud Indian Agency. (App. IV, Doc. 42.) No comparable figures were found for earlier dates.

(4) Reservation of land for Indian purposes. The 1904 Act (sec. 2) and the 1910 Act (sec. 1) authorized the reservation of land for agency (sub-issue station), Indian school and religious purposes. This is consistent with leaving the reservation boundaries untouched. On the other hand, terminating the reservation status and setting land aside for future use for agencies to serve the Indians, for Indian school and for missions, all for the benefit of the resident Indians, cannot be reconciled with termination of reservation status.

(5) Townsites. The 1904 Act did not provide for townsites, again probably because it originated as an outright cession under which townsites would be provided under the public land laws. Act of March 3, 1863, c. 80, sec. 1, 12 Stat. 754, and Act of March 3, 1877, c. 113, 19 Stat. 392. Section 4 of the 1907 Act authorized the Secretary to reserve land for townsite purposes with the net proceeds from the sale of such lands to be paid to the Indians.

Section 3 of the 1910 Act authorized the Secretary to reserve land for townsite purposes, to set apart and patent to the municipality up to 10 acres in each townsite for school, park and other public purposes, and to pay 20% of the proceeds from the sale of town lots for the construction of school houses or other public buildings or in improvements in the townsites and to credit the Indians with the balance. The contribution of 20% of the Indians' money to pay for public structures in towns and the donation of tribal land for schools, parks and other purposes can be rationalized only if the Indians were to share in the benefits as residents of the reservation. Any other view would charge Congress with an intent to defraud -- an interpretation to be avoided. The opinion below makes no reference to this gratuity feature of the townsite provisions.

(6) Reservation of timber land. The 1904 and 1907 Acts fixed arbitrary prices for the lands. The 1910 Act (sec. 4) called for classification and appraisal before disposal and reserved to the Tribe the land classified as timber. If, as held below, that portion of the reservation were being wiped out and Indian title extinguished, why reserve timber lands to the Tribe? Why leave the Tribe with vested interests? The opinion below is silent of the point.

(7) Allotments. The 1907 Act (sec. 2) conferred on Indians living in the affected area (Tripp county) the option of relinquishing their allotments and selecting allotments "anywhere within said reservation", and in addition, directed the Secretary to grant an allotment to each eligible unallotted child. The 1910 Act (sec. 1) granted to Indian allottees the option to relinquish their allotments within the affected area (Mellette county) and select lieu allotments "on the diminished reservation". Section 2 directed that before the lands were opened "the allotments within the portion of the said Rosebud Reservation to be disposed of as herein prescribed shall have been completed." The 1904 Act contained no allotment provisions doubtless because it originated as an outright cession. (See p. 7, supra.) The district court's reliance on the allotment provisions, as supporting its conclusion of disestablishment is discussed at pages 23-29, infra.

(8) The school land grant. All three statutes granted the school sections or equivalent lands to the State for which the United States was to pay $2.50 per acre. (1904 -- sec. 4; 1907 -- sec. 6; 1910 -- sec. 8.) (The district court's reliance on the school land provisions is discussed at pages 30-31 infra.

(9) Liquor laws. Section 10 of the 1910 Act made the liquor laws of the United States applicable to all land, Indian and nonIndian, in the affected area for a period of 25 years, -- the term of the trust patents issued to the allottees. To the district court this liquor provisions was clear indication of the Congressional intent that "this was not to be considered henceforth Indian land." (App. I, op. 67.) We deal further with the district court's views on the liquor laws at pages 31-33, infra.

2. The district court misconstrued the allotment, school land, and intoxicant provisions of the three statutes. In support of its judgment of disestablishment the district court placed primary reliance on its reading and construction of the allotment, school land and intoxicant provisions of the three Rosebud statutes. (App. I, op. 43-46, 54-58, 66-72.) In all three instances the court's analysis and conclusions are erroneous.

a. The allotment provisions of the 1907 and 1910 Acts. The district court quoted in part from Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 106 (1973) where the Supreme Court observed: "A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was terminated." (App. I, op. 56.)[17/] Although, elsewhere the court subscribed to the proposition that each congressional act and treaty is different and must be so examined (App. I, op. 49-50), it undertook to distinguish the Rosebud allotment provisions from those in Mattz. (App. I, op. 56-58, 70-71.)

17/ To this the district court might have added the Supreme Court's statement (idem, p. 102): "Rather, allotment under the 1892 Act is completely consistent with continued reservation status."

In the first place, when dealing with Indian statutes, substance, not form controls. Courts do not play with differences in provisions among statutes relating to different tribes, where such differences are compelled by circumstances present in one case and not the other. In Mattz and this case, the underlying policy expressed by the General Allotment Act of 1887 was the same -- continue the reservation system and the trust status. Allot tracts to individual Indians. Make unallotted lands available to nonIndians "with the purpose, in part, of promoting interaction between the races of encouraging Indians to adopt white ways." (Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 101-102 (1973). When all the lands had been allotted and the trust period expired, the reservation could be abolished.[18/]

In the second place, in Mattz, there was legislative hostility to allotments and to the reservation. (37 L.ed.2d 103-105.) It was "against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced." (Idem, p. 105.) Prior to the 1892 Act in Mattz there had been no recognized reservation. There had been no allotments. Not even the sites of Indian villages and settlements were protected. This accounts for the Mattz allotment language allowing one year for allotments and protecting the sites of Indian villages and settlement. This is the language that the court below ruled distinguishes Mattz, pointing out that the Rosebud Acts did not have a comparable one year allotment provision. (App. I, op. 57-58; 70.)

18/ Congress extended the trust period for individual allotments at Rosebud by the Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 984 (25 U.S.C. 462).

Of course, no comparable language is in the Rosebud statutes. Allotments had been underway on the Rosebud reservation since the 1889 Act. There was no occasion to allow a year, as in the case of Mattz where the Indians had never been allotted. There was no occasion to reserve title to Indian villages. All the land embraced in the entire Rosebud reservation had been confirmed to the Sioux since the 1851 Treaty of Fort Laramie, reconfirmed in the 1868 Treaty, and segregated and reconfirmed for the Rosebud in the 1889 Act. This points up the validity of the rule that language in one Indian statute cannot control the intent of Congress in a different statute dealing with another tribe and another fact situation.

In the third place, in drawing its parallel with Mattz, the district court incorrectly read the allotment language of the Rosebud 1907 Act and misconstrued the language of the Rosebud 1910 Act.

(1) The district court incorrectly read the allotment language of Section 2 of the 1907 Act. Referring to the allotment provisions of the 1907 Act, the district court confined itself to the relinquishment language (App. I, op. 56-57), and concluded that the "clear import of that section is that the Indians in the portion soon to be opened, were allowed to relinquish that part of the reservation and remove to the diminished portion of the reservation." (App. I, op. 57.) This view will not withstand analysis.

The relinquishment language is plain. No matter where an allotment was on the reservation, the allottee could exchange for an allotment "anywhere within

said reservation", including the Tripp county portion. This was explicitly spelled out in the reports to both the House and the Senate, explaining as follows:

> "The bill further provides that before proclamation of the President, declaring the land open for settlement, the Indians within the reservation may relinquish allotments and select allotments in any other portion of the reservation, including the tract affected by this bill [Tripp county]. The purpose of this is to provide an opportunity for the Indians to relinquish worthless lands that they may have selected heretofore, and take better or more desirable lands in lieu thereof." 19/

H. Rept. 7613, 59th Cong., 2d sess., p. 3 (1907), adopted in toto in S. Rept. 6838, 59th Cong., 2d sess. (1907). (App. III, Docs. 21, 23, see p. 22, supra.) The trial court's construction is in direct conflict with the plain language of the 1907 Act and the committee reports.

The same sentence relating to relinquishment construed by the trial court directed that 160 acre allotments be granted to each eligible Indian child. (See p. 22, supra.) We have no 1907 figures, but in 1913 there were about 500 Indians and about 2600 allotments in the Tripp county portion of the reservation. (See pp. 19-20, fn. 16, supra.) Although sections 8-11 of the 1889 Act provided continuing authority to allot within the Rosebud Reservation, apparently an administrative delay had resulted in a backlog of some 600 or 700 Indians on the reservation who were without allotments. The Indians had complained about this at the council proceedings. (Council proceedings, January 18, 1907, p. 14.) (App. III, Doc. 19.) It was in response to that complaint that Congress in the 1907 Act directed the Secretary of the Interior to issue allotments to the unallotted, eligible children.

19/ Emphasis supplied throughout this brief unless otherwise indicated.

Such allotments could be made anywhere on the reservation, including Tripp county, affected by the 1907 Act, up to the date that the President proclaimed the lands open. Had Congress intended to dissolve the reservation status of the Tripp county portion of the reservation, it hardly would have provided for 160 acre allotments anywhere on the reservation, including Tripp county.

(2) The district court omitted part and incorrectly construed the remainder of the allotment language in the 1910 Act. Section 1 of the 1910 Act offered allottees on the affected portion of the reservation (Mellette county), the option to relinquish their allotments before the lands were offered for sale and to select lieu allotments "on the diminished reservation". The district court considered this allotment provision to be "the strongest indication yet that the area in question was no longer to be considered 'Indian land'." (App. I, op. 71.) The court viewed the option provision as a Congressional offer to allow Indians to move out of Mellette county "to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from all of the programs that the government had on the reservation." (Idem, op. 71.)

About the time of the Act of May 30, 1910, there were at least 1400 Indians and in excess of 4200 allotments in Mellette county. Indian Population in United States and Alaska 1910, (GPO 1915); letter dated April 26, 1913, Superintendent to Commissioner of Indian Affairs (App. IV, Doc.42). The President opened the land for settlement thirteen months later, on June 29, 1911 (40 L.D. 164). The

district court construed the statute to mean that Congress was telling some 1400 resident Indians that if they wanted to remain reservation Indians and receive the benefits of Government programs, they had 13 months in which to relinquish their homes of perhaps 20 years standing in Mellette county, surrender their improvements to the land, uproot their families and community ties, and remove themselves and their belongings to whatever allotments could be found in the picked-over remainder of what constituted the trial court's "reservation" at that time -- i.e., Todd county.

Fortunately, the facts do not compel so insensitive a result. The word "diminished", as used in the 1910 Act must be delegated its place in the total context. The expression "diminished reservation", as well as the stronger expression "restored to the public domain", appear in the Act of May 29, 1908, 35 Stat. 460, a surplus land statute affecting both the Cheyenne River and Standing Rock reservations, two of the six Sioux reservations segregated under the 1889 Act (page 6, fn. 8, supra). The two expressions were advanced as proof of the Congressional intent to dissolve the Cheyenne River reservation. This Court rejected the contentions in United States v. Erickson, 478 F.2d 684, 687-688 (C.A. 8, 1973). There is no occasion here to discuss the phrase "restored to the public domain" because it does not appear in any of the Rosebud statutes. As to "diminished" this Court pointed out that the reservation may be "diminished in land size *** without changing the reservation boundaries (idem, p. 687). The court below made no reference to Erickson in reaching its conclusion with respect to the word "diminished".

"Diminished" also may have been used as a shorthand term of identification. Compare Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92 where the statute directed that all of the surplus lands embraced in "what was the Klamath River Reservation" be opened under the public land laws. The Supreme Court stated (p. 102) that the reference to the reservation in the past tense "is not to be read as a clear indication of congressional purpose to terminate", but seems (p. 103) "merely to have been a natural, convenient, and shorthand way of identifying the land subject to allotment under the 1892 Act. We do not believe the reference can be read as indicating any clear purpose to terminate the reservation directly or by innuendo."

Finally, the district court omitted all reference to the provision of Section 2 of the 1910 Act directing that all allotments within Mellette county be completed before the land was opened. That provision was construed by the Bureau of Indian Affairs to provide "for allotments in the opened territory to every man, woman, and child who has not heretofore received an allotment; ***." Letter dated November 12, 1910, Assistant CIA. (App. IV, Doc. 40B.) Thus, according to the district court, when Congress authorized fresh allotments in Mellette county, it at the same time intended to dissolve that portion of the reservation because it required Indians who wanted to give up their allotments, to take lieu allotments outside of Mellette county.

Thus, the foundation falls away from the trial court's conclusion of disestablishment resting on the allotment provisions. What the district court conceived to be evidence of an intent to dissolve the reservation status, in fact reaffirms the intent to preserve the reservation status.

b. The school land grants. Each of the three Rosebud statutes granted sections 16 and 36, or equivalent land, to the State for school purposes. The district court considered these grants as strong evidence of an intent to wipe out the reservation status. (App. I, op. 43-46; 54-56; 66-67.) The court pointed to South Dakota's Enabling Act specifying that lands in "Indian, military or other reservations" were not available to satisfy the Federal school grant until "the reservation shall have been extinguished and such lands be restored to *** the public domain."[20/] (Idem, op. 43.) The district court inversly reasoned that by the 1904 Act, title to the tribal land must have been "extinguished and the lands restored to the public domain" because otherwise under the language of the enabling act the school grant would not apply. (App. I, op. 44.)

The court was in error. The reverse is true. The sections 16 and 36 within the Rosebud reservation were never public land. Title was not extinguished. The reservation was not disestablished. (See cases discussed at pages 36-40.) If the explicit grant of the school lands had not been written into each of the Rosebud statutes, the school sections would have remained Indian land. Minnesota learned this when it undertook to satisfy its school grant out of Chippewa reservation lands affected by a surplus land statute substantively the same as the Rosebud statutes. Minnesota v. Hitchcock, 185 U.S. 373 (1902).

20/ This provision is not unique. It appears in the Enabling Acts of North Dakota involved in the Fort Berthold statute, which this Court held did not disestablish the reservation. City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972). It also appears in the Enabling Act of the State of Washington involved in the case of Seymour v. Superintendent, 368 U.S. 351 (1962).

Again the district court's position that the school land provisions demonstrated disestablishment of the reservation is left without foundation.

c. Intoxicant provisions. Section 10 of the 1910 Act subjects all lands in Mellette county, trust and fee, to the Indian liquor laws for 25 years. Before the 1910 Act, all land in Mellette county was in trust status and therefore Indian country subject to the liquor laws. Section 10 was designed to place those lands in the same position with respect to the Indian liquor laws as they were before the 1910 Act. The district court treated this provision almost as if it were proof positive that Congress intended to eliminate the reservation status of Mellette county. (App. I, op. 67-70.)

In 1910 it was a crime to sell liquor to an Indian ward anywhere in the United States, and it was a crime to introduce intoxicants into "Indian country". (Act of January 30, 1897, c. 109, 29 Stat. 506.) Prior to the 1948 statutory definition of "Indian country" (18 U.S.C. 1151), and at the time of the 1910 Act, the Federal cases defined "Indian country" as used in the 1897 Act to mean land to which the Indian title had not been extinguished. Clairmont v. United States, 225 U.S. 551, 557-559 (1912); Dick v. United States, 208 U.S. 340, 359 (1908); United States v. Bris, 121 U.S. 278, 280 (1887); Bates v. Clark, 95 U.S. 204, 207-208 (1877); including trust allotments, United States v. Pelican, 232 U.S. 442, 449-450 (1914); United States v. Erickson, 478 F.2d 684, 688 (C.A. 8, 1973). In addition, under a Supreme Court decision in effect during the interval 1905 to 1911, the law was that once an Indian received a trust allotment he

became a citizen free of the Indian liquor laws. Matter of Heff, 197 U.S. 488 (1905), ignored in Hallowell v. United States, 221 U.S. 317 (1911) and expressly overruled by United States v. Nice, 241 U.S. 591 (1916); Cohen, Felix S., Handbook of Federal Indian Law, p. 157 (GPO 1945).

The district court was aware that the Indian liquor laws extended to Indian country but erroneously assumed that land held by homesteaders under the 1910 Act, also was Indian country. Based on this erroneous assumption, the court mistakenly reasoned that if Congress had intended to leave the reservation status unaltered, there would have been no need explicitly to extend the liquor laws to all land in Tripp county for 25 years, the period of trust allotment. Rather, the court thought this was a "buffer" area.[21] (App. I, op. 67-70.)

If Section 10 had been omitted, under the law in force in 1910, it would have been lawful to introduce intoxicants onto the fee land interspersed among the allotments, and during the period 1905-1911, it would have been lawful to sell liquor to Indians in Mellette county so long as they were off of trust land.

21/ The court's suggestion that section 10 of the 1910 Act created a "buffer" area has no rational basis. (App. I, op. 68.) Buffer areas were carved out of public land, adjoining Indian country in order to prevent the sale of liquor along the boundaries of the land retained by the Indians. Felix S. Cohen, Handbook of Federal Indian Law, p. 353 (GPO 1945). A good example is found in Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942), where public land surrounding the reservation on the east and north was withdrawn to control the liquor traffic. First, the 1910 Act was not a cession, did not convert Mellette county into public land, and could not be a buffer area. (See pp. 36-40, infra.) Second, it is a misnomer to call an intermixed area of trust and fee land a "buffer" area. A glance at the map makes apparent that Mellette county could not be a buffer for Todd or Tripp counties. The idea of a "buffer" area originated with the court below. No mention of it appears in the legislative materials.

Section 10 conferred the same protection that existed before the 1910 Act was enacted. It insured that liquor could not be sold to anyone, anywhere in Mellette county for the 25-year period of the trust patent, Matter of Heff, supra, to the contrary notwithstanding. Section 10 enlarged, it did not diminish, the protection attaching to the reservation. Section 10 should have led the court below to the opposite conclusion.

C. None of the three Rosebud statutes extinguished Indian title to any of the surplus land affected by those statutes. There is a critical difference between an outright sale by a tribe to the United States and the United States acting as trustee to dispose of tribal land with the proceeds to be credited to the tribe.[22] Where a tribe sells and the United States buys all tribal interests, nothing is left in the tribe. There is an absolute conveyance. Title to the ceded land is extinguished. The interest of the tribe is finally and completely ended. Examples of this class, mostly before 1880, are numerous. (See Cohen, Handbook of Federal Indian Law, (GPO 1945), pp. 334, fn. 521; 294, fn. 64; Federal Indian Law, supra, (GPO 1958), p. 602, fn. 6.)

1. None of the three Rosebud statutes is an outright cession and sale. Tribal title to the affected land was not extinguished. The last section of each of the three acts affirmatively spells out that the United States was not buying the surplus land or guaranteeing to find buyers, but was simply acting as trustee

22/ The late Felix S. Cohen, "an acknowledged expert in Indian law" (Squire v. Capoeman, 351 U.S. 1, 8-9) discusses the two classes. Cohen, Felix S., Handbook of Federal Indian Law, pp. 334-336 (GPO 1945); Federal Indian Law, pp. 710-717 (GPO 1958).

to dispose of the land and pay over the proceeds to the Indians. (See p. 18, supra.) The beneficial title remained in the Tribe until the entryman paid the purchase price and earned his patent. Ash Sheep Co. v. United States, 252 U.S. 159 (1920); United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913); Minnesota v. Hitchcock, 185 U.S. 373, 393-395 (1902); United States v. Brindle, 110 U.S. 688, 693 (1884); Hanson v. United States, 153 F.2d 162, 163 (C.A. 10, 1946); Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 432 (1943).

The 1907 and 1910 Acts contain no words of cession or sale, but simply direct the Secretary to dispose of the land and credit the proceeds to the Tribe. Nor do the substantive provisions of the 1904 Act use words of cession or sale. Section 1 of the 1904 Act incorporates pro haec verba the unratified 1901 agreement with its broad words of conveyance ("do hereby cede, surrender, grant, and convey to the United States all their claim, right, title and interest ***"). But that was only dressing, a front, to give the bill the face of an agreed cession. Even if the Indians had consented to the 1904 Act, and they did not, such language of cession alone, does not determine whether the Government became a trustee or acquired unfettered title. Indeed, even where the title of a tribe is concluded by an outright sale and purchase, this Court has held that the extinguishment of title does not necessarily support the implication that the reservation is disestablished. United States ex rel. Feather v. Erickson, 489 F.2d 99 (C.A. 8, 1973), petition for a writ of certiorari filed April 8, 1974 (42 U.S.L.W. 3595).

The fundamental error below was that the court perceived no difference between an outright sale and the United States acting as trustee to sell the Tribe's land. The court thought that the 1904 Act simply reflected "a change in an appropriations matter and not a change in any substantive effect ***." (App. I, op. 39-40.) In pursuit of that theme, the district court regarded the 1904 Act as if it were an outright cession that extinguished tribal title, vested complete ownership in the United States, placed the land in the public domain and "did away" with the reservation. The court derived these conclusions, all erroneous, from the history of 1902 bills to ratify the September 14, 1901 agreement to sell the Gregory county land for $1,040,000 -- bills that were never reached for vote -- as if that were the legislative history of the 1904 Act. (App. I, op. 36-40, 42, 44.) Even though the 1907 and 1910 Acts contain no comparable camouflage language of sale and cession, the trial court treated those acts as if infected with the court's version of the legislative history of the rejected bills erroneously ascribed to the 1904 Act.

In this fashion the decision below reached the premise that no controlling distinction exists between a voluntary sale and purchase and the involuntary arrangements reflected in the Rosebud "surplus" land statutes; that one as much as the other made the United States the owner; and, that, consequently the Rosebud statutes extinguished the title, placed the land in the public domain and disestablished the affected portions of the reservation. Thus the court repeatedly concluded that Congress intended "to do way with" the 75% of the Rosebud

reservation within the four counties,[23] to restore the unallotted land "to the public domain",[24] to extinguish "the title of the Indians",[25] "to return the counties to the public domain and to extinguish the reservation or 'Indian land' nature of those counties".[26] But for this faulty premise, the court below might have reached a correct judgment.

2. The case law establishes that the United States took as trustee, not as owner. Even if the three statutes had contained broad words of cession, that would have made no difference. So long as the United States acted as trustee to dispose of the land and credit the proceeds to the Tribe, Indian title was not extinguished. Decisions of the Supreme Court provide a number of good examples. In United States v. Brindle, 110 U.S. 688 (1884), the tribes, by an 1854 Treaty, did "cede, relinquish, and quit-claim *** all their right, title, and interest". The United States agreed to dispose of the land and pay the proceeds over to the tribes.[27] Brindle was a federal land receiver entitled to receive a

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23/ e.g., App. I, op. 43, 49, 78.

24/ e.g., App. I, op. 44, 46. "Restore" is not strictly accurate, since the land never had been in the public domain.

25/ e.g., App. I, op. 44, 48, 54, 56, 60, 61, 75.

26/ e.g., App. I, op. 75.

27/ Apparently the parties and the court below were under the impression that the trust formula had its origin in the 1904 Rosebud act. As shown by Brindle, the formula was used in 1854 and there are others before 1904. The court refers to the "new policy" (App. I, op. 35, 39-40). Cohen dates the practice as commencing in the 1880's. Handbook of Federal Indian Law, pp. 334-336 (GPO 1945).

maximum of $2,500 in commissions from the sale of public lands. He sued for the excess above $2,500 on the ground that the 1854 Treaty lands were not public lands. The Supreme Court agreed stating (110 U.S. 693):

> *** The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that the United States occupied any other position under the cessions than that of trustees, with power to sell for the benefit of the Indians. In equity, under the operation of the Treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this we have no doubt. ***.

In Minnesota v. Hitchcock, 185 U.S. 373 (1902), an 1889 Act, enacted before the district court's "new policy" (Act of January 14, 1889, c. 24, sec. 1, 25 Stat. 642), provided "for the complete cession and relinquishment in writing of all their title and interest" and specified that "acceptance and approval of such cession and relinquishment *** shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided."

The State of Minnesota claimed under its grant of sections 16 and 36 in every township of "public land". The Supreme Court held that public lands were lands subject to sale or other disposal under the public land laws, that the Indian land was not public and denied Minnesota's claim, stating, 185 U.S. at pp. 394-395:

> *** The cession was not to the United States absolutely, but in trust. *** The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds *** to the credit of the Indians ***.

Also, United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913).

Four days after the Rosebud Act of April 23, 1904 was approved a similar statute was enacted for the Crow Tribe. Act of April 27, 1904, c. 1624, 33 Stat. 352. The language of conveyance was "cede, grant, and relinquish to the United States all right, title, and interest". A livestock company, enjoined from running sheep on Indian lands, defended on the ground the lands were public because the words of conveyance vested the United States with perfect title. Ash Sheep Co. v. United States, 252 U.S. 159 (1920). The Supreme Court rejected this argument, and made plain that it was the purpose of the statute, not the language of conveyance, that controlled, stating (p. 166):

> Taking all of the provisions of the agreement together, we cannot doubt that while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become 'public lands' in the sense of being subject to sale or other disposition, under the General Land Laws.

An extreme example is found in the Act of June 15, 1880, c. 223, 21 Stat. 199. Section 3 of that Act specified that "all lands not so allotted, the title to which is, by said agreement *** released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of public lands, at the same price and on the same terms as other lands of like character ***." Despite this unmistakeably clear and comprehensive language, the Solicitor of the Department

of the Interior held that the Utes retained beneficial ownership. Restoration to Tribal Ownership of Ceded Colorado Ute Indian Land, 56 I.D. 330 (1938). The Solicitor stated (56 I.D. at pp. 337-338):

> *** The significant legal effect of these [surplus land] cessions is that the United States becomes a trustee for the disposal of the land ceded. Regardless of the particular language of the cession, the result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a 'trustee in possession'.

The Solicitor was confirmed in his views by the Court of Claims in Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 432 (1943).

Thirty-three examples embraced in 25 separate statutes are listed in the opinion and order approved by the Secretary of the Interior in 1935, temporarily withdrawing surplus lands from disposal under authority of the Indian Reorganization Act, authorizing the Secretary "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened ***." Act of June 18, 1934, c. 576, sec. 3, 48 Stat. 984; 54 I.D. 559, 561-562, 564. And the surplus lands under the three Rosebud statutes were specifically withdrawn and restored to the Tribe. (54 I.D. 562.)

The decision below does not address itself to the principle of law established by Brindle, Hitchcock, Ash Sheep Co., and like cases discussed above. The district court does mention Ash Sheep Co., but disposes of it with the gloss that the 1904 Crow statute "contains several provisions which the [Rosebud] 1904

Act does not." (App. I, op. 49.) The court points to no controlling differences between the Rosebud statutes and those in the adjudicated cases, and we are aware of none. More important, the court below failed to recognize the significance of Ash Sheep Co., -- namely, that regardless of language, if the United States acts as trustee to dispose of the land, the statute does not extinguish the title. It remains in the tribe until the entryman pays the purchase price and does all things necessary to earn the right to a patent.

In the Tribe's view, this line of cases exemplified by Brindle and Ash Sheep Co., removes the underpinning of extinguishment on which the decision below depends.

D. The history of the three Rosebud statutes denies a Congressional intent to disestablish any part of the reservation.

1. Unratified cession and sale. In 1901 Congress empowered the Secretary of the Interior to negotiate agreements for the cession of "surplus or unallotted lands". Act of March 3, 1901, c. 832, 31 Stat. 1058, 1077.[28] That same year the Secretary dispatched Inspector McLaughlin to Rosebud to negotiate an agreement "for the cession of that portion of the Rosebud reserve embraced in Gregory county." Letter dated March 19, 1901, pp. 1, 2. (App. II, Doc. 2.) Among other things, the Inspector was advised that the "proposition for

28/ An earlier bill to accomplish this for Gregory county failed. H. Rept. 486, 56th Cong., 1st sess. (1900). (App. II, Doc. 1.)

the cession" did not come from the Indians and was cautioned that any agreement must be executed and signed by at least three-fourths of the male adults as required by Article 12 of the 1868 Treaty. (Idem, pp. 6, 7.)

When McLaughlin came upon the reservation in the spring of 1901, there were about 4917 Sioux living on the reservation. (App. II, Doc. 3, p. 17.) Some 4508 allotments had been made reservation wide pursuant to the 1889 Act (p. 7, supra). Of these, about 452 allotments were in the Gregory county portion of the reservation. Sen. Doc. 31, 57th Cong., 1st sess., p. 6 (1901). (App. II, Doc. 3.)

In September 1901 McLaughlin negotiated an outright sale and purchase of the unallotted land in Gregory county, about 416,000 acres for $1,040,000, or $2.50 per acre. (Idem, p. 6.)[29] McLaughlin prepared an agreement dated September 14, 1901, consisting of six articles reciting that the Rosebud Indians

29/ McLaughlin reported that the "land in Gregory County is without doubt the best and most desirable portion of the Rosebud Reservation ***." (Idem, p. 6.) That the Indians held the land to be worth $7 to $15 per acre (p. 37); that all the white men connected with the agency "held the lands in question as worth $5 per acre; that it appeared that adjacent lands *** were selling for $5 to $10 per acre" (p. 38). When the Indians resisted the cession, he told them that because of the white demand the "lands will be opened before long anyway" and they should not miss the opportunity of "making a good bargain with the Government ***" (idem, p. 15). When the Indians complained that the price was too low, that adjoining lands off the reservation were selling for a much higher price and that a railroad was coming, McLaughlin told them that they had "only a life occupancy title", they were "simply tenants for life" that they could not sell the land to anyone but the Government and could not lease the land except through the Government, that therefore their tenure was less valuable then the absolute fee of a white man (idem, p. 17), and that in any event $2.50 per acre was the full value of the land.

"do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted" in Gregory county for the sum of $1,040,000. (Idem, p. 28.) The sixth article called for ratification by Congress. Appended to the agreement were the "X" marks of 12 more than three-fourths of the male adults. (Idem, pp. 29-35.)

The Secretary of the Interior transmitted to Congress the executed agreement, related papers, and a draft of a bill with a recommendation for ratification. (Idem, p. 1.) Had Congress adopted that bill, Indian title to the "surplus" land would have been extinguished. But that did not happen.

In March 1902 the Senate and House Committees on Indian Affairs reported out bills ratifying the agreement. S. Rept. 662, 57th Cong., 1st sess. (1902); H. Rept. 954, 57th Cong., 1st sess. (1902). (App. II, Docs. 4, 5.) The Senate bill included a new provision directing that sections 16 and 36 of the lands acquired in each township or equivalent lands be granted to South Dakota as school lands. (Idem, p. 2.)

The House Committee on Indian Affairs filed a second report eliminating the grant of school lands set out in the Senate bill, explaining that the committee was of the opinion that the school grant provision was "not necessary, as under existing law sections 16 and 36 would be granted to the State upon the extinguishment of the Indian title." H. Rept. 2099, 57th Cong., 1st sess., May 17,

1902, p. 1 (App. II, Doc. 6.) Objection was raised to the appropriation of public funds to pay for Indian lands that would be turned over for free homesteads and donated to the State for schools. The bills were passed over and never reached for a vote. 35 Cong. Rec. 3187-88 (1902); 35 Cong. Rec. 4801-07 (1902). (App. II, Docs. 7, 8.)

2. The 1904 Act. To overcome the objections, new bills were introduced in the next session and reported out of both the House and Senate Committees on Indian Affairs. The new version (S. 7390), followed the pretense of ratification of the September 14, 1901 agreement, but in fact simply opened the lands to settlement with the United States acting as trustee to dispose of the lands and credit the proceeds to the Tribe. (See p. 7, supra.) Sen. Rept. 3271, 57th Cong., 2d sess. (February 23, 1903); Instructions of June 30, 1903 to McLaughlin. (App. II, Docs. 9, 10.)

Doubtless because S. 7390 was a gross departure from the cession and sale agreement of September 14, 1901, Inspector McLaughlin was instructed to negotiate for the consent of the Rosebud Sioux to an agreement carrying out the essential provisions of the bill. Instructions of June 30, 1903, p. 1. (App. II, Doc. 10.) McLaughlin met with Rosebud councils on five different days over a period extending from July 24 through August 10, 1903. Council proceedings. (App. II, Doc. 11.)

McLaughlin prepared and submitted an agreement following in substance the critical provisions of the Senate bill (idem, p. 34). (App. II, Doc. 12 is the draft of agreement.) The Indians objected that the lands were worth more than $2.50 per acre because after the 1901 negotiations, the railroad had been built in that part of Gregory county outside of the reservation greatly enhancing the value of the Indian lands within the reservation;[30/] that the provisions for payment were uncertain and inadequate; that the United States did not even guarantee the payment of the $1,040,000 stipulated as the purchase price in the September 14, 1901 agreement; and that under the terms of the bill, the settlers might not make payment at all. McLaughlin report of August 31, 1903, pp. 5-6; also see the analysis of the Commissioner of Indian Affairs in his 1904 report on the negotiations. H. Rept. 443, 58th Cong., 2d sess., pp. 5-7 (January 21, 1904). (App. II, Docs. 13, 14.) McLaughlin failed to get the requisite consent. He reported that the value of the land "made it impossible for me to conclude an agreement along the lines proposed in the said Senate Bill, for the price per acre

30/ Higher values were later confirmed by the Commissioner of Indian Affairs who reported that disinterested information indicated that "the lands were worth a considerably larger price than that agreed to be paid [in 1901] *** and that no doubt the entire tract taken as a whole, exclusive of allotments, is worth considerably more than $2.50 per acre." The Commissioner concluded that the "Indians cannot see *** why they should not procure such price for the lands as settlers are willing to pay for them." H. Rept. 443, supra, p. 7. (App. II, Doc. 14.) For other material indicating that the land was worth several times the $2.50 per acre see Sen. Doc. 158, 58th Cong., 2d sess. (1904), pp. 3-7. (App. II, Doc. 17.)

which I felt obliged to insist upon under my instructions." McLaughlin report of August 31, 1903 to the Secretary of the Interior, pp. 5-6. (App. II, Doc. 13.)[31/]

Thereupon, a new bill was introduced early in 1904 (H.R. 10418) substantially the same as S. 7390, except that the requirement for Indian consent was omitted.[32/] Congress disregarded the Tribe's refusal to consent to the agreement, and the bill became the Act of April 23, 1904, c. 1484, 33 Stat. 254.[33/]

3. 1907 Act. Less than two years after the 1904 Act, Inspector McLaughlin was again instructed to negotiate with the Rosebud Tribe, this time for the "cession" of its unallotted land in Tripp county under an arrangement similar to the 1904 Act (Instructions of December 5, 1906 to McLaughlin). (App. III, Doc. 18.) In mid-December 1906, and again in mid-January 1907, McLaughlin held council. McLaughlin had with him a bill that he read and explained to the Indians. The

31/ McLaughlin got 90 signatures ("X's") at the last council. Then he toured the several districts of the reservation trying to collect signatures but fell 296 short of the necessary three-fourths. (App. II, Doc. 13, p. 4; also App. II, Doc. 14, p. 7.)

32/ The legislative history of H.R. 10418, appears in H. Rept. 443, 58th Cong., 2d sess., January 21, 1904; House debates, 38 Cong. Rec. 1421-29, January 30, 1904; S. Rept. 651, 58th Cong., 2d sess., February 4, 1904; printed in toto in Senate debate, 38 Cong. Rec. 4984-88 (April 18, 1904), all supplied in App. II, Docs. 14, 15, 16.)

33/ The Commissioner of Indian Affairs, in his report to the Secretary of the Interior made plain that the "time has come when Congress and the Indian Department are warranted in administering the tribal interests of the Indians in the United States, including the matter of disposing of such of their lands as they do not need and do not use, without consulting the Indians affected in reference thereto." (App. II, Doc. 14, p. 8.) And in his testimony to the House Committee on Indian Affairs, the Commissioner expressed what he thought of the solemn treaty guarantees calling for Indian consent to any disposal of tribal land, with the rhetorical question: "Supposing you were the guardian or ward of a child 8 or 10 years of age, would you ask the consent of the child as to the investment of its funds?" (Idem, p. 5.)

December negotiations failed. Council proceedings, in particular, pp. 13, 23, 28, 42, 43, 54. (App. III, Doc. 19, 1st section.) McLaughlin travelled to Washington for instructions and returned to the reservation for further councils held on January 17, 18, and 21, 1907 (App. III, Doc. 19, 2d section, pp. 1, 11, 38), at which he made concessions to the Indians' demands concerning price, the administration of minors' funds, allotments to 600 or 700 Indians and other items. An agreement dated January 21, 1907 was executed by 43 of the Indians present. After visiting the several districts to solicit signatures, a total of 705 thumbprints were received, 321 less than the required three-fourths majority. McLaughlin report of February 12, 1907, pp. 3, 4. (App. III, Doc. 20.)

Although the agreement was void for lack of the three-fourths majority, the Secretary of the Interior recommended a bill setting out the agreement and ratifying it. H. Rept. 7613, 59th Cong., 2d sess. (1907), pp. 5-6. (App. III, Doc. 21.) The recommendation was not followed. The House Committee on Indian Affairs reported a bill, ultimately enacted as the Act of March 21, 1907, that incorporated some of the provisions of the void agreement and rejected or modified others. (Idem, App. III, Doc. 21.) [34] The Congressman from South Dakota, the manager of the bill, on the floor, told the House that a majority of the Indians consented to the bill but made no mention that the 1868 Treaty required a three-fourths majority, Cong. Rec. pp. 3104-05, February 16, 1907.

34/ e.g. The House bill provided for townsites and reduced the rate of interest on the proceeds in the Treasury from 5% to 3%.

(App. III, Doc. 22.) On the Senate side the committee adopted House Report 7613, supra, (App. III, Doc. 23), and the Senate passed the bill without debate. 41 Cong. Rec., p. 3323 (February 19, 1907). (App. III, Doc. 24.)

4. The 1910 Act. In 1908, less than two years after the 1907 Act, a bill, introduced in the Senate (S. 9379) and reported out of committee, would authorize the sale and disposition of the unallotted land in Mellette county. The bill was "substantially the same" as the act adopted in 1908 for the Cheyenne River and Standing Rock reservations, [35] two of the six Sioux reservations segregated under the 1889 Act. (See fn. 8, p. 6, supra.) Sen. Rept. 887, 60th Cong., 2d sess., p. 1 (January 29, 1909). (App. III, Doc. 25.) The report recited that the bill was not submitted for the consideration of the Indians because "it would delay the consideration of the matter unduly" (idem, p. 2). However, the Senate refused to act on the bill in that posture. 43 Cong. Rec. 1679, February 1, 1909. (App. III, Doc. 26.) Inspector McLaughlin again was ordered to Rosebud, not to get the consent of the Indians, but simply "to take up with the Indians *** the matter of opening" part of the reservation. Instructions of April 2, 1909 to McLaughlin. (App. III, Doc. 27.)

McLaughlin travelled to Rosebud where he explained the bill and held three councils. Council proceedings, March 11, 1909, pp. 1-8; April 21, 1909, second section, pp. 1-6; April 26, 1909, pp. 6-28. (App. III, Doc. 28.)

35/ Act of May 29, 1908, c. 218, 35 Stat. 460, construed by this Court in United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973), not to disestablish the Cheyenne River reservation.

McLaughlin did not seek the Indians' consent. He merely solicited their views. McLaughlin reported on his efforts but no further action was taken in the 60th Congress. McLaughlin's report of April 29, 1909. (App. III, Doc. 29.)

New bills were introduced in the next Congress and after conference to reconcile House and Senate differences not material here, the bill became law. 36/

5. 1911 negotiations. This left Todd County as the only county embraced within the Rosebud reservation that was unaffected by "surplus" land statutes. In 1911 a bill (S. 110) was introduced in the Senate to dispose of the unallotted land in Todd county. Inspector McLaughlin again was sent to Rosebud with instructions to "take up" the provisions of S. 110 with the members of the Rosebud Tribe "for the purpose of ascertaining their views ***." Instructions of May 22, 1911 to McLaughlin. (App. III, Doc. 36.) He held a council on November 1, 1911, but without success. Council proceedings. (App. III, Doc. 37.) In deferential language, McLaughlin sympathetically reported the objections of the Indians. McLaughlin report of November 3, 1911. (App. III, Doc. 38.) Even so, the Secretary of the Interior recommended enactment. The bill was reported out and passed by the Senate where it died. Sen. Rept. 1166, 62d Cong., 3d sess., pp. 3-4 (1913); 49 Cong. Rec. 3, 4210. (App. III, Docs. 39, 40.)

36/ The legislative history is found in the following: Sen. Rept. 68, 61st Cong., 2d sess. (1910), (App. III, Doc. 30); Senate debate, 45 Cong. Rec. 1073, 1075, 1910, (App. III, Doc. 31); H. Rept. 332, 61st Cong., 2d sess., reprinted in H. Rept. 429, 61st Cong., 2d sess., pp. 1-3, February 10, 1910, (App. III, Doc. 32); House debate, 45 Cong. Rec. 5456-5473, April 2, 1910, (App. III, Doc. 33); Conference H. Rept. 1368, 61st Cong., 2d sess., May 16, 1910, 45 Cong. Rec. 6415-6416, 6436, 6437, (App. III, Docs. 34, 35).

On the theory of the court below, if the 1911 bill had become law, there would be no Rosebud Indian reservation.

E. The court below inappropriately treated collateral and extrinsic materials as reflecting the intent of Congress.

1. The court below intermixed the legislative history relating to bills providing for the ratification of the September 14, 1901 voluntary sale with the history of the 1904 "surplus" land bill that ultimately became the 1904 Act. The court borrows from the 1902 Senate debates on the rejected bills, where statements were made by a Senator, not the manager or sponsor of the bill, that the lands would "become part of the public domain", would "be brought under the public domain by cession to the United States", and that payment would be "for the purpose of separating the Indians and extinguishing the reservation". Each of the quoted excerpts is underscored in the opinion below. (App. I, op. 37-38; the last quote is repeated at op. 42.) 37/

First, statements made during debate of one bill hardly provide a valid basis for finding the meaning of a bill in a subsequent Congress, designed for a different purpose.

Second, even if the quoted statements were made in connection with the bill that became law, they may not be used to find legislative intent. To be sure, as an aid to interpretation "resort may be had to *** exposition of the bill on the

37/ For full text of the debates see 35 Cong. Rec. 4801-4807, April 29, 1902. (App. II, Doc. 7.) See also 35 Cong. Rec. 3187-3188, March 24, 1902. (App. II, Doc. 6.)

floor of Congress by those in charge of or sponsoring the legislation." Wright v. Mountain Trust Bank, 300 U.S. 440, 464, fn. 8 (1937). But the comments quoted by the district court were not those of a sponsor, or of the manager of the bill. "It is the sponsors that we look to when the meaning of the statutory words is in doubt". NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964).

Third, read in the context of the debate on a bill calling for ratification of a voluntary sale for $1,040,000, the quoted statements are not inconsistent with the general understanding of the law. Under the September 14, 1901 agreement, the United States was buying and paying for the land. Full title would have passed to the United States.

In effect, the court below read these statements made during the 1902 debate of a bill to ratify the voluntary sale, a bill never reached for vote, into the legislative history of the 1904 Act, saying they "were considered by the Congress of the United States to be one and the same ***", except for the school land provision. (App. I, op. 40.) The improvident use of the legislative materials in this fashion contributed to the erroneous judgment of the court.

2. Statements made during the "negotiations" at council proceedings, even if correctly construed, are not evidence of Congressional intent. The trial court treated 1906 statements by McLaughlin, the Indian Inspector, or by Indians at the proceedings, almost as if they were to be read into the language of the statute. For example, to demonstrate that the Gregory county portion of

the reservation was disestablished, the trial court quoted McLaughlin at the council proceedings held two years later on December 14, 1906. (App. I, op. 50-51.) The quotation set out in the opinion is intended to show that when McLaughlin in 1906 said that a railroad in Gregory county "has not yet come across your reservation boundary ***", it meant that McLaughlin considered the 1904 Act portion of Gregory county to be outside of the reservation, and therefore the statute meant the same thing. The conclusion is not supported by the record or by McLaughlin's complete statement, even if post-1904 Act statements were evidence of 1904 Act intent.

It must be remembered that the eastern portion of Gregory county was never within the 1889 boundaries of the reservation. The record shows that by 1903, a railroad had been built in the eastern portion of Gregory county outside of the 1889 Act reservation. (p. 44, supra.) The record does not show whether, by 1906, an additional rail line had been built into the 1904 Act portion of Gregory county. But if the district court's quotation from McLaughlin is read in context with what proceeded it, the greater odds are that McLaughlin was including as part of the 1889 Act reservation, the 1904 Act portion in Gregory county.

When McLaughlin spoke he was responding to Two Strike, a Rosebud spokesman, who stated (Council proceedings, p. 4; App. III, Doc. 19):

> Two Strike - [From the context Two Strike may have been referring to a map]. *** The railroads pass here without paying us anything. I understand there is going to be another one through here, [38/] but we have not heard anything about the pay. My friend, tell the railroad people not to come in here, to turn back from where they are. We want our children to grow up on this reservation and on this land. ***.

McLaughlin answered (idem, pp. 4-5):

> In regard to the railroad running north of White River, [north of the northern boundary of the reservation], that road is being built across what is called the ceded portion. The Indians *** ceded that portion of the reservation in 1889 *** you have received credit ***. If a railroad was coming through your reservation proper, that is, any of the [six] segregated reservations [established by the 1889 Act], you would receive pay for it. There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation [etc., continuing with the quotation as set out in the opinion.] 39/

This colloquy has no bearing on Congressional intent. But even if it did, McLaughlin's statement, read in context, does not support the trial court's conclusion that "McLaughlin's assumption was that Gregory county was no longer a part of the Rosebud Sioux Reservation." (App. I, op. 51.)

Another example of inappropriate use of 1906 statements to show 1904 Act intent is found in the district court's use of a statement by High Pipe, a Rosebud spokesman at the 1906 council proceedings. The gist of the quotation

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38/ Two Strike speaking in the future tense may have been referring to an extension of the railroad into the reservation, or the 1904 Act portion of Gregory county.

39/ Two Strike's statement and the underlined portion of McLaughlin's answer were omitted in the opinion below. (App. I, op. 50-51.)

is that High Pipe observed that the "best land we have is in the eastern part of our reservation, Tripp County." (App. I, op. 51-52.) The court advanced the quotation as proof that the Indians considered the 1904 Act portion of Gregory county to be outside of the reservation.

High Pipe was speaking for more allotments. (App. III, Doc. 19, p. 8.) As noted, a portion of Gregory county was in the eastern part of the reservation. High Pipe knew that no allotments were obtainable in Gregory county because those lands had been proclaimed open for settlement on May 13, 1904. (32 L.D. 622 (1904).) Thus he spoke of Tripp county in terms of the eastern part of the reservation where land for allotments was available. Even if appropriate, the 1906 observation of an individual Indian, expressed in Sioux and interpreted into English, is a small item on which to rest the Congressional intent to disestablish a portion of the reservation by the 1904 Act.

F. The consistent administrative construction of the three Rosebud Acts excludes the conclusion that any of those Acts disestablished the reservation. The courts give great weight to the construction of a statute by an agency responsible for its administration. Zemel v. Rusk, 381 U.S. 1, 11 (1965); Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Here the Department of the Interior charged with responsibility for Indian affairs, has consistently recognized and administered the entire reservation including the area affected by the three statutes, as an Indian reservation.

1. The Secretary of the Interior treated the Rosebud reservation as embracing the territory delimited in the 1889 Act. In the Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 984, Congress extended the period of trust on trust allotments (25 U.S.C. 462), unless such lands were on the public domain outside of the geographic boundaries of any Indian reservation (25 U.S.C. 468). The period of trust was extended on trust allotments on lands affected by surplus land acts. See Putnam v. United States, 248 F.2d 292, 294-295 (C.A. 8, 1957).

The Indian Reorganization Act of 1934, supra, (25 U.S.C. 463), authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal ***." Under authority of that language, the Secretary explicitly listed for withdrawal from disposal and for restoration to tribal control, the undisposed of land on the Rosebud Indian Reservation affected by the 1904 Act, the 1907 Act, and the 1910 Act. He identified Rosebud as one of the "reservations where lands have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of." (54 I.D. 559, 561, 562 (1934).) The Supreme Court regarded 54 I.D. 559 as exemplifying the administrative view that the reservation was not dissolved. Seymour v. Superintendent, 368 U.S. 351, 357, fn. 14 (1962).

2. The Secretary of the Interior approved the tribal Constitution defining the reservation as originally established. Article I of the tribal Constitution provides that the "jurisdiction of the Rosebud Sioux Tribe of Indians shall extend

to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, ***." (App. IV, Doc. 53.) The Secretary approved the constitution on December 20, 1935.

3. The Field Solicitor for the Department of the Interior considered that no part of the reservation was disestablished. By memorandum dated April 6, 1972, the Field Solicitor advised the Area Director that in his opinion none of the three Rosebud Acts disestablished any part of the Rosebud reservation. (App. IV, Doc. 56.) The opinion rests primarily on an analysis of the language of the three statutes.

4. The entire area of the 1889 Act Rosebud Reservation has been consistently administered as an Indian reservation and the Indians on the reservation were administered to as reservation Indians. During the period under discussion and beyond, the reservation was divided into seven administrative districts. (App. IV, Doc. 51, p. 3.) The table following shows by districts, the location, Indian population, day schools and allotments. 40/

District	Location	Population	Day-Schools	Allotments
Agency	All in Todd Co.	1200	2	Not Available
Cut Meat	All in Todd Co.	1000	4	133
Black Pipe	All in Mellette Co.	500	4	98
Little White River	All in Mellette Co.	500	4	968
Butte Creek	Todd & Mellette	800	4	1889
Big White River	Tripp, Lyman, Gregory	500	2	1770
Ponca	Tripp & Gregory	500	1	905
Totals:		5000	21	5763

40/ The names and locations of the districts and day schools are shown on the map (App. IV, Doc. 43). The population, number and names of the day schools and the number of allotments are shown in App. IV, Doc. 42, letter of April 26, 1913.

The agency headquarters were and still are at Rosebud in the Agency district. A "Farmer" had administrative responsibility for each district. He acted as a subagent. (App. IV, Doc. 51, p. 3.) On the seven districts were 21 day schools,[41] three boarding schools,[42] eight issue stations (App. IV, Doc. 43, map), and the Agency headquarters. Issue stations and day schools were located in each district. The Farmer's headquarters for each district were located at the station where the Indians were issued their rations and supplies and received instructions from the Farmer. (App. IV, Doc. 42, p. 2.) The younger Indian children attended the day schools in the various districts, and the others attended the three boarding schools in the Agency district. (App. IV, Doc. 40A, p. 371.)

Before the three Rosebud statutes were enacted, and since, the entire area, as defined in the 1889 Act, has been administered as a reservation by the officers of the United States entrusted by Congress to carry out the Federal law and to expend Federal and tribal funds. The National Archives contains thousands of communications to and from the Rosebud Indian Agency from before the time the reservation was established in 1889. These communications evidence continued administration of the reservation defined in the 1889 Act as the Rosebud reservation.

41/ The 21 day schools are listed in App. IV, Doc. 50 (letter, September 18, 1913).

42/ Two mission and a Government school, all in the Agency district. (App. IV, Doc. 52.)

It is impracticable to deal with the mass of Archives material in an appellate brief. To bring even the flavor of the materials to the Court, we refer to the annual Agency reports for 1913. The reports cover Industries and Agriculture, Indian Homes, Female Industrial Teachers, Health, and Construction for the entire 1889 Act reservation. (App. IV, Docs. 44-49.) A partial report on education is also included. (App. IV, Doc. 50.) These reports show Federal administration and activities in each district of the reservation. Certainly, contemporaneous with the statutes and thereafter, the United States did not regard any part of the Rosebud reservation as disestablished. And there has been no change since. (See pp. 54-55, supra.)

G. Selected phraseology in subsequent legislation is equivocal with respect to fixing the Congressional intent expressed in the three Rosebud statutes. The court below pointed to four acts of Congress subsequent to the Rosebud statutes in each of which the affected land was referred to as "within the former Rosebud Indian Reservation" or "what was formerly a part of the Rosebud Indian Reservation" or equivalent language. (App. I, op. 47, 48, 59, 72.) The court deemed such expressions to be indications of the Congressional intent to extinguish the reservation status. (App. I, op. 48, 61, 67.) The court made no reference to similar statutes, that granted time extensions to settlers but did not refer to the reservation as "former". (e.g., Act of March 26, 1910, c. 129, 36 Stat. 265; Act of May 28, 1914, c. 102, 38 Stat. 383.)

The district court placed undue significance on such statues. All were enacted for the benefit of the public land homesteader, in connection with the administration of the public lands by the General Land Office. As might be expected, these public land statutes were framed in the publicland vernacular. They contain no language deliberately chosen to express an intent of Congress, one way or the other, with respect to the dissolution of an Indian reservation. Compare Gila River v. United States, ____ Ct. Cl. ____, (slip op, p. 8, April 17, 1974).

Where a statute is Indian-oriented, different language is employed. For example in 1964, Congress enacted a statute entitled "An Act to place in trust status certain [Federal] lands on the Rosebud Sioux Reservation" and transferred to the Tribe, title "to the following described tracts *** on the Rosebud Sioux Reservation", including 320 acres described in the statute as located in Mellette county (E½ of Section 35, T. 42 N., R. 33 W., 6th P.M.). Act of August 20, 1964, 78 Stat. 560. If Mellette county were not part of the reservation in 1964, why was Congress restoring to the Tribe title to land in Mellette county, which according to the court below was wiped out as a reservation some 60 years earlier?

Another Indian-oriented example is found in the Act of March 3, 1909, c. 263, 35 Stat. 781, 3 Kappler 388, 417. That act authorizes the Secretary to issue a fee patent "for the land set apart to the Catholic Church on the Rosebud *** Reservation, *** as follows: [describing land in Section 7, Township 96 North, Range 71 West of the 5th P.M.] in Gregory county]". According to the court below in 1909 that land in Gregory county was outside the reservation.

Thus, although the court below limits its attention to statutes sustaining its position, there are statutes from which no position or an opposite position may be gleaned. Viewed as a whole, the subsequent enactments are inconsistent, inconclusive and for that reason not a reliable indicator of Congressional intent. "[S]ubsequent legislation usually is not entitled to much weight in construing earlier statutes." Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 107, fn. 25 (1973). City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (1972); United States v. Erickson, 478 F.2d 648, 687 (1973). The subsequent statutes selected below have no influence on the determination of the Congressional intent expressed by the three Rosebud statutes.

Conclusion

The judgment below should be reversed and the case remanded with instructions to enter a judgment declaring that the boundaries of the Rosebud Indian Reservation are those fixed by the Act of March 2, 1889, c. 405, 25 Stat. 888.

Respectfully submitted,

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SECTION 2

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE,

Appellant

v.

HONORABLE RICHARD KNEIP, et al.,

Appellee.

No. 74-1211

Appeal from a judgement of the United States District Court
for the District of South Dakota concerning a declaratory judgement action
to determine the boundaries of the Rosebud Indian Reservation

Hon. Andrew W. Bogue, Judge

BRIEF OF APPELLEE

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IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE,
Appellant

v.

HONORABLE RICHARD KNEIP, et al.,
Appellee.

No. 74-1211

Appeal from a judgement of the United States District Court for the District of South Dakota concerning a declaratory judgement action to determine the boundaries of the Rosebud Indian Reservation

Hon. Andrew W. Bogue, Judge

BRIEF OF APPELLEE

Appellee adopts, for the purposes of this brief, the material in appellant's brief under the heading "Jurisdictional Statement" and "Statutes Involved."

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether or not the Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, were intended by Congress to diminish the Rosebud Reservation as originally defined in the Act of March 2, 1889, by disestablishing certain portions thereof.

STATEMENT OF CASE

The Rosebud Reservation was created by the Act of Mar. 2, 1889, 25 Stat. 888. Although it was stated in the preamble to be a "permanent" reservation, Section 12 therein provided the means by which the United States could buy and the members of the Rosebud Sioux Tribe could "sell" such "portions" of the "reservation" as could be agreed upon from time to time, subject, of course, to the ratification of Congress. The portion of the reservation "sold or released" was "to be held by the United States for the sole purpose of securing homes to actual settlers." Act, *supra*, Sec. 12.

Pursuant to Section 12, the United States initiated three separate negotiations with the members of the Rosebud Sioux Tribe. Each of these resulted in the passage by Congress of three separate acts: The Acts of April 23, 1904, 33 Stat. 254; March 12, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, encompassing what is now approximately one-half of Gregory County, all of Tripp County and a portion of Lyman County, and all of Mellette County, South Dakota, respectively.

The portions of the reservation thus acquired by the United States were released by the United States to actual settlers. This area now consists primarily of a patchwork of small farms, on or near which a total population of approximately 20,000 individuals reside.

In 1972 the Rosebud Sioux Tribe initiated this action in Federal District Court for the District of South Dakota to seek "declaratory judgment as to the effect of these acts on the size of the reservation." Answer for Plaintiff in reply to Counties' request to make more definite and certain, at 2 [hereinafter cited as A.P.]. In a well written and extensively documented opinion, the court below held that " the surrounding legislative history and the circumstances *clearly*" indicated that the Rosebud Reservation had in fact been diminished and that each of the counties concerned had in fact been separated therefrom. This opinion, which is still in the process of publication and therefore to date unreported, is reproduced in Appellant's Appendix 1 at 27 (hereinafter cited as A.A.).

This appeal followed.

INTRODUCTORY STATEMENT

> In order to understand Federal Indian law, a constant awareness of history must be maintained. The early pronouncements, such as those of Chief Justice Marshall, quoted in this threatise must be considered in the light of the historical situations then existing. There is a great expanse between the status of Indians as dependent nationalities in Marshall's time and their national citizenship today. Federal protection of the tribal government, which now exercise what are recognized simply as municipal powers, still survives, but not on the original basis.
>
> It has not been presumed that Congress has ever intended, nor does intend, any fraudulent objective or any base act in its legislation in the unique field of Indian affairs. Courts presume that Congress acts in good faith and that presumption is adhered to in this revision. Further, it has been assumed that nothing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as a trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States.
> DEPT. OF INT., FEDERAL INDIAN LAW 2 (1958).

It is the appellee's position that neither *Seymour*, *Mattz*, nor the recent opinions constitute any sort of a mandate for this Court to rule in the tribe's favor if this Court is convinced, and that conviction is soundly based upon probative evidence of congressional intent, that Congress, by the passage of the three Rosebud acts, intended to diminish the Rosebud Reservation.

As Justice Frankfurter once stated:

> Indian law is a vast hodge podge of treaties, judical and administrative rulings, and unrecorded practices in which the intricacies, the perplexities, the confusions and injustices of the law governing Indians lay concealed.

Compounding this complexity is the fact that the Court has been asked to ascertain precisely what effect a congressional delegation legislating in the first decade of the 20th century intended certain acts to have on the Rosebud Reservation. In this respect the usual "vantage point of time" is in actuality a serious disadvantage, and with this in mind, appellee has attempted to reconstruct the situation as it existed in the early 1900's with the aid of:

1. The text of the three acts.
2. The Senate and House Documents;
3. The Congressional Record;
4. The transcripts of the negotiation sessions;
5. Correspondence and reports from the Department of the Interior and the Commissioner of Indian Affairs; and,

6. Later statutes, state historical documents and reports of the Rosebud Indian Agents.[1]

The appellee realizes the limited probative value of some of these materials, but has nevertheless included them in order to recapture the tenor of the period. This tenor represents, in effect, your appellee's theory in this action. In this respect, the appellee would urge the Court not to place too much emphasis or significance on any one word or sentence in any of this material. Congressional intent can be a very illusive concept. For example, the following quotation appears in appellant's brief below at page 15.

> [T]his bill is in line—if fact, almost a duplication—of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country. . .[T]here are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms. . .[This] will have the effect of civilizing the Indians who have allotments and also give value to these allotments which at present are of very little value. . .In addition to that, just as soon as these reservations are opened up and settled[,] railroads usually come in and thereby give greater value to the lands owned by the Indians. Brief for Plaintiff below at 15. [hereinafter cited as B.P.]

Apart from the fact that this was one of the only three isolated references to the Congressional Record or Senate and House Documents in appellant's entire brief below, the quotation is illustrative of two other factors of which the court should be aware.

In the first place, to cite this statement for the proposition that "Contemporary history indicates that Congress did not intend the three acts to operate to diminish the Rosebud Reservation" (B.P. at 14) is highly questionable—at least in the *form* presented to the court below. Congressman Burke actually stated:

> Mr. Burke of South Dakota. . .I might say, Mr. Speaker, that there are propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, and doing no good, opened up and developed into farms, *AND I BELIEVE THAT THE PLACING THROUGH WHAT WERE HERETOFORE RESERVATIONS* actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. 45 Cong. Rec. 5457 (1910) (emphasis added).

The court will note how, by the use of three small dots and the deliberate omission of several very important words, the tenor of an entire paragraph can be destroyed.

Secondly, and more importantly, the correct quotation is illustrative of an even greater problem. Many of the materials with which the court will be presented contain references to "on," "in," and "within," such as the "on" in the above quotation. Initially one might equate the "disposing of the unallotted and unused lands *on* Indian Reservations" with the continued existence of the reservation. Yet, shortly thereafter, is an unequivocal reference to the placing of settlers "through what were *heretofore* reservations." By itself, the paragraph might seem ambiguous and confusing; but when viewed as an integral part of the other material of the period, the tenor of the entire paragraph clearly emerges and this is the important point. Unless these materials are placed in their proper context *and viewed in their entirety*, the crux of nearly a decade of Indian legislation intended by Congress to extinguish certain portions of the Rosebud Reservation will be for naught, much to the detriment of the non-Indian settlers and their descendants, who will over sixty years later suddenly find themselves within the exterior boundaries of a reservation and subject to a tribal jurisdiction, the limits of which appellant did not even care to expound upon in the court below.

Appellee agreed with appellant that the exact powers of the Rosebud Sioux Tribe are not in litigation at this time and for this reason a discussion of these powers has not been presented in this brief. However, it is interesting to note that even the cursory list appearing in plaintiff's answer to the counties' motion for a more definite statement does not appear anywhere within either the brief below or appellant's brief to this Court. Since it is asking this Court to declare, in effect, that the counties are within the Rosebud Reservation and therefore subject to these tribal powers, the counties think some mention should be made of the scope of this tribal jurisdiction. Plaintiff's list will suffice for this purpose:

(a) Criminal Jurisdiction, *Smith v. Temple*, 152 N.W. 2d 547, 548.

(b) Civil Jurisdiction, *Smith v. Temple*, *supra*.

(c) Sales tax authority, attached memorandum for the South Dakota Department of Revenue and within this area the Rosebud Sioux Tribe and the United States would have jurisdiction to the exclusion of the defendants.

1. Appellee has relied primarily on the contemporary documents of the period; the bulk of the material presented in this brief is from pre-1910 sources, with some material dating up to 1920. It is appellee's position that this is the period from which the intent of Congress should be gleaned. The direction or purpose of "Indian Policy" fluctuated in later decades and for this reason appellee has been somewhat reluctant to accept any later reference at face value unless that reference could be substantiated in the documents of the period to which it referred. In this respect, it has followed the mandate of Tacitus. . ."Refer everything back to its own year."

(d) Tribal taxing authority, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89.

(e) Tribal regulation of intoxicants, 28 U.S.C. Section 1161.

A.P. at 2.

It is the appellee's position that Congress, by the passage of the three acts, intended to separate and remove the counties from the Rosebud Indian Reservation in such a manner that they would never again be considered to be either within the exterior boundaries of the reservation or subject to whatever powers the Rosebud Sioux Tribe might lawfully exercise therein. The purpose of this brief is to present to the Court probative evidence of that intent.

ARGUMENT

1904 Act[2]

I. *THE GENESIS OF THE 1904 ACT*

A. THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

Subsequent to the date that appellee submitted its brief to the court below, six separate cases concerned with issues similar to the ones presented herein have been decided.[3] Perhaps the most influential of these in terms of the format of the argument to be presented to this court was *United States ex rel Feather v. Erickson*, 489 F.2d 99(C.A.8, 1973). In the court below counsel for plaintiff had conceded in its brief that the ratification of the 1901 "cede, sell, relinquish" lump-sum cession agreement would have diminished the Rosebud Reservation. Consequently, appellee qualified and limited the presentation of the documents related to that agreement for the express purpose of a simple comparison with the 1904 Act. Substituted counsel for the appellant has now apparently taken another position, although it is not altogether clear from appellant's brief. In one portion thereof a position is taken that the 1901 materials will not necessarily support a diminution in light of *Feather*. In many others however it was "improvident" for the lower court to consider

2. Act of April 23, 1904, 33 Stat. 254—A portion of Gregory County. A detailed history of the openings of the Rosebud Reservation appears in 18 S.D.L.Rev. 85 (1973). Your appellee will use the same chronological approach appearing therein, although in a summary fashion, in this brief.

3. *United States ex rel Condon v. Erickson*, 478 F.2d 684(CA 8 1973); *Mattz v. Arnett*, 412.U.S. 481 (1973); *State of South Dakota v. Wilhamson*, 221 N.W. 2d 182 (S.D. 1973); *DeCoteau v. District Court*, 211 N.W. 2d 843 (S.D. 1973); *United States ex rel Feather v. Erickson*, 489 F.2d 99 (1973); *Cook v. South Dakota*, No. 11326-2-FGD (S.D., filed Mar. 13, 1974).

the 1901 materials—they were "designed for a different purpose"—were not inconsistent with the general understanding of the law (in light of *Feather*??)—and were used by Congress as a "facade" (for what, in light of *Feather*??) or a pretense of an agreed cession (for what reason, in light of *Feather*??). In light of the position taken by counsel for appellant in 48 N.D.L. Rev. 551 (1972) and before the South Dakota Supreme Court in *State v. Molash, supra*, that the Yankton and Sisseton Reservations were disestablished by acts of nearly identical wording, this ambivalence is understandable although nevertheless confusing.

In any event appellee will take the position that in light of the *Feather* opinion, all of the Rosebud documents from this era can be equally persuasive, in this respect, in ascertaining the intent of Congress. In other words there was no "new policy" but rather, as aptly stated in the *Condon* opinion "simply a new method utilized by the Congress that no longer favored purchasing Indian Land and providing them free of cost to settlers." 344 F.2d at 687.

Secondly, with respect to the *Mattz* opinion, appellee notes and considers extremely significant the fact that the court in *Mattz* cited and utilized everything from the history of bills that were never enacted to various Annual Reports from the Commissioner of Indian Affairs, to ascertain whether or not Congress intended to disestablish the Klamath River Reservation. In this brief appellee will do the same with the purpose of surpassing the standards set forth by the United States Supreme Court that it be "clear" to this Court from the "surrounding circumstances and legislative history" that the Rosebud Reservation was in fact diminished. *Mattz, supra*.

In this light, and in view of the cardinal rule of Indian law that separate treaties with separate tribes must be separately construed, appellee is confident that the Rosebud materials are sufficiently persuasive with respect to what Congress intended to do to the Rosebud Reservation to be distinguishable from, and suggest a conclusion opposite of the rulings of the recent decisions of this Court, - while at the same time following the guidelines set forth therein.

In *Condon, supra*, this Court found the question presented to be "close" and resolved the issue in favor of the tribe. In this case the question presented remains the same, but the question is not close. As the lower court stated:

> The allottment sections, the school land provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and the subsequent congressional enactments for each act lead this court to believe and be of the opinion that the surrounding legislative history and circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or "Indian land" nature of those

counties thereafter.

A.A.1 at 74-75.

1. 1901 Negotiations.

Since 1889, Gregory County had been anxious to acquire that portion of the Rosebud Reservation within its boundaries, ostensibly because the county government could not be maintained by the number of settlers on the small amount of non-reservation land available within it. After nearly two years, the county obtained the assistance of the very able congressional delegation from South Dakota.[4] and under their direction the processes of acquisition were set in motion. Inspector James McLaughlin,[5] at the direction of the Department of the Interior and pursuant to Section 12 of the 1889 Act, was instructed to go to the Rosebud Reservation to treat with the Indians for a cession of this land. Although it was stated in the preamble that this was to be a "permanent" reservation, as noted by appellant, Section 12 therein provided:

> SEC. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of *such portions of its reservation* not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said

4. The dominant members of South Dakota's congressional delegation consisted of Senator Robert J. Gamble and Congressman Charles H. Burke. Senator Gamble was elected to the United States Senate in 1900. He remained in that office until 1912. He was very active in all legislation concerning Indian lands durig that period.

Senator Gamble's fellow solon, Charles H. Burke, was elected in 1900. He remained in that office until 1906 when he was defeated in the election. He was, however, re-elected in 1908 and served until 1914. Congressman Burke later served for several years as Commissioner of Indian Affairs.

These two gentlemen had many things in common:

(1) Both chaired the Indian Affairs Committees in their respective houses.
(2) Both authored considerable legislation affecting Indians and Indian lands.
(3) Both submitted the committee reports concerning the legislation discussed herein to their respective houses.
(4) Both were members of the congressional delegation before the West River Reservation was diminished.
(5) The materials herein indicate that both understood the so-called "Crook Treaty," and were aware of its relation to later acts.
(6) One or the other of these men introduced and sponsored the bills presented therein.

5. Inspector James McLaughlin was United States Indian Inspector for the Department of the Interior. He had considerable experience in this particular area and eventually served the Office of Indian Affairs for over 50 years.

> tribe of Indians, which purchase shall not be complete until ratified by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States for the *sole purpose of securing homes to actual settlers*, and shall be disposed of by the United States to actual and bona-fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education. . . . Act of March 2, 1889, Section 12, 25 Stat. 888 (emphasis added).

In early 1901 Inspector James McLaughlin, acting pursuant to Section 12 and at the request of the Department of the Interior, concluded an agreement with the Indians for an outright lump-sum cession of the surplus portion of the Rosebud Reservation lying within Gregory County. As stated above, appellant conceded in the court below the effect this agreement would have had on the boundaries or size of the Rosebud Reservation had it been immediately ratified. Consequently, appellee's brief below only summarily referred to the documents that confirmed that concession. In light of appellant's new position, and *Feather, supra*, however, a more detailed account of the negotiations would seem appropriate.

In the first instance, appellee's argument in relation to the effect the 1901 agreement would have had on the size or boundaries of the Rosebud Reservation is *not* premised solely on the fact that the operative language of the 1901 agreement contained the "cede, sell, relinquish" preamble of nearly 40 years of established cession agreements which extinguished reservations throughout the entire Western United States. Nor is it premised solely on the fact that the government was to purchase the land for a sum certain and without the trust restrictions of those surplus cession agreements tailored to comply with the Dawes Act of 1887. Rather, the thrust of its argument is founded upon the clear and concise documentation of that effect which appears in all the materials which surrounded the 1901 negotiations and the agreement both before and after it was amended: a documentation that the Rosebud Reservation was to be "diminished" to a "nice square reservation," a "square tract about the same size and area of the Pine Ridge" reservation, that by "disposing of this corner of the reservation," the members of the Rosebud Sioux Tribe would have a "nice square reservation," a "compact and almost square area about the same size and area as the Pine Ridge Reservation," in effect a "diminished reservation." For example, the following series of interchanges that took place at a counsel on August 13, 1901, in the Ponca Creek District of the Rosebud Reservation:

> Inspector McLaughlin: My friends, I have called to see you today for the purpose of ascertaining whether or not you are willing to sell the unallotted lands in Gregory County to the Government. . . .You doubtless know that there has been considerable talk for the past two years of *negotiating with you people for this corner of the reservation*. . . In negotiation with Indians for tracts of land, a portion of which has been allotted to them, *the privilege has been given the Indians to elect whether they shall*

remain upon their allotments or relinquish their allotments and remove to the reservation. I do not think that it is for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the best lands of this county, and it is very doubtful if you could find as good land anywhere within the *diminished reservation for the reason that the best lands have all been allotted . . .If you dispose of this surplus land* it will leave you about the same size reservation as the Pine Ridge Indians have. . . .By disposing of this little corner of the reservation, it would leave you a nice square reservation and the proceeds of the sale would benefit you very much. Council Transcript at 1, April 13, 1901 (emphasis added). [hereinafter cited as C. T.]

Again, on April 15, 1901, when Inspector McLaughlin met with the Indians of the Big White River District he explained the situation in the same manner as he did in the Ponca Creek District:

> Every person would have the privilege [sic] of remaining on the land that has been allotted to him, or of relinquishing it and *removing to the diminished reservation, but I would advise you who have selected tracts of land to remain upon your allottments in case of the cession of this land to the Government* . . . . C.T. at 1-3 (emphasis added).

Similarly, on September 5, 1901:

> Inspector McLaughlin: I am here under orders of the Secretary of the Interior who was authorized by Congress, at its last session, to negotiate through any Indian inspector, with any Indian tribes for the cession of their surplus lands, and he has sent me here to negotiate with you for your surplus lands in Gregory County, that is, for all of your lands in Gergory County that has not been allotted to Indians. .If an agreement for these is reached by us, the allottees of Ponca Creek district will be brought into direct contact with the white settlers but as I said before, it is only a question of time until that condition has to be met. . . .
>
> *The cession of Gregory County will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge reservation.* . . C.T. at 1-4, Sept. 5, 1901 (emphasis added)

And the members of the tribe were very much aware of the fact that this was the "effect" the 1901 agreement would have. Statements similar to the one by Ralph Eagle Feather appeared throughout the entire transcript:

> We Indians intend to own the land and have taken it in allotment just as the president said to take it. We want payment for all vacant land left after that. After that the Indians for future generations can live upon the land and own it, that is, the land within the *diminished reservation*, in case Gregory County should be ceded. CT at 24, Sept.10, 1901 (emphasis added).

The one thing that is clear from the appellant's brief with respect to controverting this aspect of the effect the 1901 agreement would have had on the Rosebud Reservation, even though its exact position on this overall issue is uncertain, is the rather conspicuous absence of citations or quotations from any contemporary source dealing with the Rosebud Reservation to support a

contrary conclusion. The reason for the "conspicuous absence" of such material in appellant's brief is, of course, that it simply does not exist. To compensate, therefore, appellant resorts to what appellee would term its "bad faith argument"—charging Congress either directly or by innuendo with "pretenses," "camouflages," "intent to defraud," or calling the court's attention time and time again to the lack of the requisite consent of the members of the tribe to any of the acts therein presented for construction—an argument that should be dispensed with at the outset.

Even if some of these allegations are correct—certainly appellee has never argued that Congress always maintained that degree of trust to which it was bound to adhere to in dealing with its Indian wards—the fact remains that these are questions of policy—questions reserved for the United States Court of Claims and are not properly before this Court and should not have any bearing on the resolution of congressional intent presented herein. The lower court recognized this argument of the appellant near the conclusion of its opinion:

> While this Court does not necessarily agree withthe mores or the methods employed at that time, there is little doubt that the congressmen were engaged in the process with the "doing away" of the reservation. This Court's only function is to determine congressional intent, not to rewrite history. A.A.I at 78.

And by so stating, the court below was complying with the dictate of the United States Supreme Court that:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution in the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with the authority to determine whether or not the United States had, in its treaty with the Indians, violated the principles of fair dealing. *United States v. Choctaw Nations*, 179 U.S. 494 (1900).

With respect to the " no consent" charge by appellant and in partial defense of Congress and all concerned it must at least be noted that the Rosebud documents are replete with citations to the 1903 United States Supreme Court decision of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The import of this decision, at least as far as Congress was concerned, was that Congress had the plenary power to deal with the Indians as it saw fit. In applying this principle to the Rosebud Indians, it soon became evident that it no longer needed the ratification of three-fourths of the adult male Indian population of the Rosebud Reservation as consent to any cession of the Rosebud

Reservation. Under the Dawes Act, some form of consent was needed nevertheless, and the Office of Indian Affairs felt that a concurrence of the majority of adult Indian males would suffice for this purpose. Although this explanation appears again and again in the Rosebud documents, it is interesting to note that appellant has neglected to mention this fact.

2. 1901 Agreement: School Land Section.

As further documentation that the 1901 agreement was intended to diminish or extinguish a portion of the Rosebud Reservation your appellee cites the school land section which the court below referred to as:

> [A]n unequivocal statement in corresponding action by the Senate of the United States premised solely and only upon the fact that the title of the Indians was extinguished and the lands restored to the public domain. It is a strong indication by Congress that its intention was to diminish the size of the Rosebud Reservation. The amendment was adopted without discussion, again buttressing the impression that the diminution of the Rosebud Reservation was a premise upon which all members of Congress acted when enacting the various Indian acts. A.A.I at 44.

More specifically the court below was referring to the fact that on the first day the original 1901 lump-sum cession agreement was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the following amendment:

> The next amendment was, at the end of the bill, to insert the following as a new section:
>
> SEC. 4. That sections 16 and 36 of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools, and the same are hereby granted to the State of South Dakota for such purpose; and in case either of said sections, or parts thereof, of the lands in said county of Gregory is lost to said State of South Dakota by reason of allotments therof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied, in quantity equal to the loss, and such selection shall be made prior to the opening of such lands to settlement.
>
> The amendment was agreed to. 35 Cong. Rec. 3187 (1902).

Senator Gamble then explained the reason for its inclusion to the Senate:

> Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. *This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinquished and the lands became a part of the public domain.* This would withdraw about 29,000 acres of these lands and would leave about 387,000 acres to be open to settlement and which would be affected by the proposed amendment. Cong. Rec., *supra* (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain.* Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The Committee of Indian Affairs first suggested the school land provision when the bill was pending before it, even though Senator Gamble felt that the provision itself was superflous as the grant to the state would become operative without further legislation when, in his words, the "reservations were opened, as in this case, and became a part of the public domain. . ." 35 Cong. Rec. 4856 (1902). If the original 1901 lump-sum cession agreement had been ratified, the reservation would have been "extinguished" and the land restored to the "public domain." The Indians would have been left, what Inspector McLaughlin referred to as a "nice square reservation."

In the court below appellant's original brief merely noted the school lands were exempted from sale and/or disposition and did not offer to quote one word of explanation for this provision. Then, after appellee had presented its argument appellant *did* make a rather ineffective attempt to controvert the presence of the school land provision in its reply brief. The court below dismissed appellant's argument simply because it was contrary to what was stated in page after page of the Congressional Record in the Senate and House Reports on the bills. Before this Court, appellant now attempts to explain away the explicit statements in the House and Senate Reports and in the Congressional Record in a similar manner by citing case law in which the courts were not even concerned with whether or not the reservation was disestablished and extinguished, but rather simply when that extinguishment of Indian title took place. Appellant then conludes with "Again the district court's position that the school land provisions demonstrated disestablishment of the reservation is left without foundation." B.A. at 31. Even more astonishing is the fact that the *Brindle* and *Hitchcock* decisions cited by appellant were concerned with cession statutes which did disestablish reservations! Perhaps this is the reason that neither of these decisions has ever been cited by any of the courts recently, including the United States Supreme Court, when resolving an issue similar to the one presented herein. They are simply immaterial to the issue.

3. Congressional Record.

Approximately 50 pages of the Congressional Record now record the heated debate that took

place on the floor of the Senate in March and April of 1902. The sole subject of this debate was a ratification of the original 1901 lump-sum cession agreement and the appropriation policy for which it stood. In light of the statement in *Condon* that "this was simply a new method utilized by a Congress that no longer favored purchasing Indian lands and providing them free of cost to settlers," however, most of the "new policy" material presented to the court below can now be deleted. 344 F.2d at 687. Nevertheless, because your appellee must persuade this Court that the 1901 agreement was intended to disestablish a portion of the Rosebud Reservation some of the material is deserving of at least a cursory examination.

For example, in the April debate on the original 1901 agreement Senator Platt attributed this same precise effect to the agreement that Inspector McLaughlin, the members of the Rosebud Sioux Tribe, and Senator Gamble had in the materials set forth above:

> Mr. PLATT of Connecticut. . . . I do not know how many million acres still remain in Indian reservations which must in the future be opened to public settlement, but there are many millions, and, at the rate we have been paying the Indians under the agreements made with them for such lands, the amount to be expended in the not very distant future will run up into the millions. . . .
>
> Now, this particular agreement comes here to be ratified upon a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the *public domain*. The Indians in negotiating said that was not a fair price for the lands and they were worth a great deal more, but finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation to pass ordinarily without any particular examination or any thought of the consequences to the Government in the matter of expense. I will not go into the history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the *public domain* by cession to the United States.

And so did Senator Clapp:

> Mr. CLAPP. . . .Here is this reservation in South Dakota. Of course the Senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and *extinguishing the reservation* or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that land is primarily and inherently worth so much an acre. 35 Cong. Rec. at 4801, 4802, 4807. (emphasis added).

Similar remarks attributing a similar effect appear throughout the debate on the 1901 agreement, but they would appear unnecessary in the absence of any citations to or quotations from, any other contemporary source by the appellant indicating a congressional intent to the

contrary. The 1901 agreement was intended to disestablish a portion of the Rosebud Reservation as stated by the court below.[6]

4. Remove to the reservation or diminished reservation.

In the 1901 Ponca Creek District council, Inspector McLaughlin told the members of the Rosebud Sioux Tribe that:

> In negotiating with Indians for tracts of land, a portion of which has been allotted to them, the privilege has been given the Indians to elect whether they shall remain upon their allotments or relinquish their allotments and remove to the reservation. I do not think that is is for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the very best lands of this country, and it is very doubtful if you could find as good land anywhere within the diminished reservation for the reason that the best lands have all been allotted. C.T. at 1-2, April 13, 1901.

Such privileges were usually given to any member of any tribe which was about to cede a portion of its reservation in which allotments had previously been made. Ordinarily, this privilege would expire upon the date the lands were to be proclaimed open to settlement. For example, the 1891 Act that disestablished a portion of the Crow Reservation provided:

> That all lands upon that portion of the reservation to be herein ceded which, prior to the date of this agreement, have been allotted in severalty to Indians of the Crow tribe shall be retained and enjoyed by them: *Provided, however*, That such Indians shall have the right at any time within three years to surrender his or her allotment, and select a new allotment within the retained reservation upon the same terms and conditions as were prescribed when selecting the first allotment. Act of March 3, 1891, 26 Stat. 4041.

In other cases the wording of the provisions which were explicitly set forth in the act would vary from "remove from the ceded area" to "remove to the remaining" or "diminished reservation." Apart from the probative value of such provisions in so far as they confirm the disestablishment of a portion of the reservation, one other ramification of such a provision that is heavily played upon by appellant is entirely misplaced: the fact that some members of the tribe would necessarily be residing upon allotments outside of the boundaries of the reservation.

Assuming the three Rosebud acts did disestablish a portion of the Rosebud Reservation all of the trust allotments situated therein would nevertheless still be defined as Indian Country for the

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6. Some of the 1903 and 1904 materials as well as other material attribute this same effect back to the 1901 agreement.

purposes of Federal and tribal jurisdiction – this was the case in the early 1900's and it is the case today.

Yet at 13 of Appellant's brief the following statement appears:

> One of the effects of disestablishing the reservation is to destroy its status as Indian country as defined in 18 U.S.C. 1151, to eliminate tribal and Federal jurisdiction, to subject the Indians to the loss of Federal and tribal benefits available only to reservation Indians, and to expose the Indian people to state laws, state taxes, state police, state courts and state officials. B.A. at 13.

A similar statement also appears at 20 of appellant's brief wherein it is stated that an altering of the reservation boundaries would "strip the reservation Indians of their Federal and tribal rights to be free of State jurisdiction." B.A. at 20.

Evidently appellant has momentarily forgotten the remaining sections of 18 U.S.C. 1151 and a good part of over 50 years of United States Supreme Court Indian case law for these simply are not accurate statements.

With respect to the civil and criminal jurisdiction, it would be superfluous to cite all of the decisions which restrict the jurisdiction of the state and expound upon the presence of Federal and tribal jurisdiction over these areas.

With respect to programs and benefits, most Federal and tribal benefits have always been available to the allottees and their families so situated, notwithstanding the fact that the tribal and Federal agencies have for over 60 years considered Todd County to be *the* Rosebud Reservation. As far as appellee has been able to determine, these Federal programs need only be "on or near Indian reservations" according to the Code of Federal Regulations. The Sisseton-Wahpeton tribe presents a prime example of the extent of tribal and Federal programs that have continued to exist irrespective of the heretofore declared status of the Lake Traverse Reservation.

If appellant has been misled by one sentence appearing in the decision of the court below, the injury was to a large extent self-inflicted – the court simply said that "Congress, in effect, offered to allow Indians to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from *all* of the programs that the government had on the reservation." A.A.1 at 71 (emphasis added). And to a limited extent, this was undoubtedly true. But neither the court below or appellee would ever maintain that the mere fact that the allotment would be situated outside the boundaries of the Rosebud Reservation would sever said allottee's

tribal relations or dependency upon the Federal government much less cause him to lose his "share in the benefits of those moneys since they would no longer be 'Indians belonging to and having tribal rights on the Rosebud Reservation' " as appellant has stated in regard to the proceeds of the land sales. B.A. at 18. Indeed, such a position would be in blatant contradiction to the Dawes Act of 1887 as implemented by subsequent legislation.

5. The "Preservation of Rights" [Benefits] Provision.

Article 5 of the original 1901 lump-sum cession agreement provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement. S.Doc. 31, 57th Cong., 1st Sess. 42 (1901).

In the court below appellant's brief was founded upon the "crucial" preservation of rights clause deemed to be significant in *New Town, supra*. Appellee pointed out that the provision appeared word for word in Article 5 of the original 1901 lump-sum cession agreement which even appellant conceded would have diminished the reservation and that a "right" to a secure reservation with a fixed boundary in a lump-sum cession agreement to cede part of that reservation would seem to be a tenuous right at best. In effect the "bundle" agrument eventually destroyed itself.

In this appeal, appellant now questions (apparently) what precise effect an immediate ratification of the 1901 agreement would have had, but only two pages of its brief are devoted to this agrument. Appellee stands on the probative evidence of disestablishment presented throughout this brief and in addition notes that the "bundle of rights" argument was not deemed to be significant in *Condon, supra*, or *Feather, supra*, indeed was not even mentioned in the opinion.

In any event, at least appellant now argues with the terminology chosen by Congress and the clause is correctly referred to as the treaty *benefit* language for, as was pointed out to the court below, the terms "right" or "rights" do not appear anywhere within the text of the three Rosebud Acts. Therefore, if said provision is deemed significant it should be only in connection with the preservation of "benefits" discussed in the preceeding subsection. In this respect the essence of the provision can be traced back to the cession agreements of the mid1800's. But for the sophisticated agrument which was originally founded upon the presence of the "crucial" provision in the three final acts, your appellee would have hardly thought it worthy of any comment whatsoever and would have therefore treated it in the same manner as Congress did.

B. THE TRANSITION PERIOD: 1902-1904

It is during this time period, at least as far as the Rosebud Reservation is concerned, that Congress changed the type of arrangement it would use in acquiring Indian land. The agreement of 1901 was amended, and as such, finally emerged as the Act of 1904. In thecourt below, appellee agreed with appellant that as to the Rosebud Reservation, "the Gregory County Act would *establish* a *new* policy." B.P. at 30 (emphasis as in original). Appellee also commended appellant for its quotation from such an excellent source of legislative history as the House of Representatives Report No. 443 appearing at 29 of appellant's brief below:

> Both of these bills [i.e., both the House andSenate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement. . .
>
> This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received. B.P. at 29-30.

But Appellee did not agree that this singular quotation could realistically be cited to support the proposition that it alone has either sufficient "legislative history" to "dispel" any confusion or cause such "ambivalence" to render the "language of the act subject to the rule. . .that doubtful expression in treaties and statutes dealing with Indian affairs must be resolved in favor of the Indians." B.P. at 31. This was especially so in view of the paragraph appearing on the very next page in the same report:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a *corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota.* H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904) (emphasis added).

Rather, the position of appellee was that this 1904 act did in fact diminish the Rosebud Reservation in precisely the same manner which would have occurred had the original 1901 lump-sum cession agreement been ratified. The position of appellee before this court remains the same. The following interrelated propositions will be utilized to support that position:

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

If the 1904 Act was not intended to diminish the Rosebud Reservation as the original 1901 lump-sum cession agreement would have, where in any of the contemporary documents is there any reference to this fundamental policy change? Appellant's brief below certainly did not contain any citations to support what would have to be referred to, at least as to the Rosebud Reservation, a rather drastic reversal in policy within a period of two years. Nor does appellant's brief to this Court.

Here, in the documents of this period, and not in the 1930's, 1940's or the 1970's, is where the metal of appellee's concept should be put to the test. Certainly, in the approximately 200 pages of materials specifically dealing with this particular reservation and the 1904 Act, there should have been one paragraph which would at least arguably support appellant's position. But it is not appellee's position that the absence of any evidence to support appellant's position should, of itself, be determinitive of the issue of what effect the 1904 Act had on the Rosebud Reservation--for there is ample evidence which should suffice to that end.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

For Congress, Inspector McLaughlin, and the Indians, the only "new policy" was an amendment which represented a feasible solution to the opposition's appropriation argument. It was not in any way concerned with the diminution of the Rosebud Reservation which your appellee has established would have followed the ratification of the original 1901 lump-sum cession agreement and each of the following subsections butress this conclusion.

A. CONTINUITY

1. Brief for Appellant Below.

In the court below appellant tried to persuade the court that the presence of the entire text of the 1901 agreement could be explained away on the basis that it was Congress' first attempt to implement the new policy. For example, at 29 of appellant's brief below the following statement appeared: "The Gregory County Act incorporates this language verbatim, as it does the entire text of the 1901 agreement." B.P. at 29. Although appellee preferred to refer to the Gregory County Act as the amended 1901 lump-sum cession agreement for that is what the 1904 Gregory County Act was appellee agreed with appellant that the text of the agreement was there. But appellee did not agree that the presence of the entire text of the 1901 lump-sum cession agreement (except for the 1901 appropriation provisions) could be rationalized away as appellant attempted, by merely stating that "certainly Congress can be excused from employing language suggested by another and echoing an abandoned policy in its very first attempt to implement a new policy." B.P. at 30.

Nor did appellee agree with appellant that "Congress exhibited an understandable ambivalence and [sic] confusion in the Gregory County Act over exactly what language would be most appropriate to express the workings of the new land acquisition policy"; that appellant's isolated quotation of Senator Burke's report was sufficient "legislative history" to dispel any "confusion" or "ambivalence",[7] or that such ambivalence "renders the above language of the act" [the entire 1901 agreement, as incorporated??] subject to any rule of construction resolving anything in favor of the Rosebud Sioux Tribe. B.P. at 31. Rather, it was appellee's position that Congress only amended the 1901 agreement to the extent necessary to implement the new policy and did not intend to change the other aspects of the agreement in any way. The court below did not think appellant's argument was persuasive.

7. The merits of the plaintiff's selected legislative history were noted in the introduction of this brief.

In this Court appellant has adopted a new argument, an argument which your appellee would submit as even more untenable than the ones submitted below. Its position is simply that the whole 1904 Act was a dirty trick:—"The format was a camouflage" "a pretense" "only a dressing, a front to give the statute the face of an agreed transaction," "the new version (S. 7390), followed the pretense of ratification of the September 14, 1901 agreement. . ." B.A. at 18, 31, 43. Appellant's consent argument has been disposed of at , *supra*, and this "camouflage" argument is so utterly without foundation that it does not even merit rebuttal. The format of the 1904 Act was the result of the way the new version was submitted. For example, the format of the bill itself, was introduced by Congressman Burke to the House on January 30, 1904, was:

> The Clerk read the *bill*, as follows: A bill to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.
>
> [entire text of *1901* Agreement]
>
> Therefore,
> Be it enacted, etc., that the said agreement be and the same hereby is, accepted, ratified and confirmed as *herein* amended and modified.
>
> [1901 Agreement as amended and modified]
>
> 38 Cong. Rec. 1422-1423 (1904).

It is appellee's position that the mere fact that Congress did use not only the language of an "abandoned" policy, but the entire text of an "abandoned" agreement intended to disestablish a portion of the Rosebud Reservation, would in and of itself, seem to be indicative of a continuity of policy as amended, and not as appellant would have this court believe, congressional incompetency or some dirty trick.[8]

And on this same point the Court will also have to excuse President Roosevelt, for as appellant stated below:

8. See Note 4, *supra*.

He employed language in that proclamation which nearly duplicated the language which Congress used in the Act of April 23, 1904. From this language, one might infer that Roosevelt did contemplate a diminished Rosebud Reservation. B.P. at 25.

2. The Senate and House Documents. Even the Senate and House Reports on the 1903 and 1904 acts, which are discussed in detail in other parts of this brief, not only treat the original and amended 1901 agreement in this same fashion, but also amend and make a part of each report, several of the 1901 documents in their entirety.

3. The Congressional Record. If one were to choose almost any page in the Congressional Record before the amendment of the original 1901 lump-sum cession agreement and compare the terminology appearing therein to that used after the agreement had been amended, he would note that the Congressmen continued in all instances to refer to thesubject matter with which they were concerned in exactly the same descriptive terminology. Perhaps more than any other single passage in the Congressional Record evidencing this continuity is Congressman Burke's explanation of the differences between the two bills to the House:

> Mr. BURKE. Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, *now* a portion of the Rosebud Reservation, in South Dakota, being that portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the Government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the Government should pay for the lands outright and then take the chance of theTreasury being reimbursed by disposing of the lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.
>
> Toward the concluding days of the last session of Congress a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the Government, disposed of to settlers under the provisions of the homestead law, and price to be fixed at $2.50 an acre, as was provided inthe original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance, and forty-eight more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he had no objection to the passage of this bill provided the Indians were insured as as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3 per acre for all lands taken within the first six months and $2.50 for all lands taken thereafter.
>
> It was thought by the committee that this would certainly insure to the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure, so far as I know. The Indian Bureau and the Secretary of the Interior have both approved it, providing we fix a price ,as we have done, that will insure

> the Indians as much money as they would have received under the original treaty. The Committee on Indian Affairs has considered it fully and at length and has spent several meetings of the full committee considering it. The report of the committee is unanimous. I do not care to occupy the attention of the House in making any extended remarks on the bill, and unless some gentleman desires to ask some questions I will reserve the balance of my time. 38 Cong. Rec. 1423 (1904) (emphasis added).

In this connection, it is also interesting to note that both appellant and some of the recent opinions seem to attach some sort of special significance to the "opening" or "opened reservation" terminology and in some manner equate this terminology with the new trustee-homestead provision which supposedly "opened the reservation without diminishing the size or boundaries of that reservation." Yet, at least with respect to the Rosebud Reservation, this simply is not the case. This "opened" reservation terminology was used by nearly every member of Congress participating in the debates from the first day the original 1901 lump-sum cession agreement was introduced:

> Senator GAMBLE. . . .It has long been the policy of the Government to *open* the Western reservations. . . .Within the limits of the land proposed to be *opened* to settlement there are upward of 450 Indian allottees, and the settlers who take these lands will be obliged to assume the responsibilities of the local community practically unaided by the Indians, and to bear largely all the responsibilities that have heretofore been borne by the Federal Government. . . .
>
> Mr. STEWARD. . . .In this very case the committee had much doubt whether the land was worth $2.50 an acre; but they finally consented to report the bill, because the Senator from South Dakota insisted that it would be detrimental and ruinous to the State of South Dakota to have settlement there tied up in this way, and that these lands *ought to be opened*. . . . .
>
> Mr. PLATT. . . .It is true that several years ago more than 10 years ago I think in *opening Indian reservations*, we paid large and extravagent prices for the land to the Indians. . . .35 Cong. Rec. 3187, 3188 (1902) (emphasis added).

but also appears throughout the congressional documents and debates before the turn of the century in connection with other acts conceded to have disestablished portions of the reservation — for example the 1889 Act which disestablished portions of the Great Sioux Reservation and the 1891 Fort Berthold Act.

B. THE OFFICE OF INDIAN AFFAIRS.

As further indication that the trustee-homestead amendment was not intended to affect the diminution aspect of the original 1901 lump-sum cession agreement which appellee has established, reference is made to the manner in which the Office of Indian Affairs handled the amendment. Inspector McLaughlin's new instructions simply explained it and then stated:

It is not deemed necessary herein to give you any definite instructions as to the form of the agreement and the manner of its execution inasmuch as you are thoroughly familiar with these features of the subject. *Attention* is invited in this connection, however, to Department *instructions* to you dated *March 21, 1901*, in connection with the negotiation of the former agreement. Letter from W.A. Jones, Commissioner of Indian Affairs to Inspector James McLaughlin, June 30, 1903 (emphasis added).

Inspector McLaughlin explained the trustee-homestead amendment to the members of the Rosebud Sioux Tribe in the same manner:

I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment. . . ." C.T. at 21, July 25, 1903.

. . .the agreement which I submit for your consideration is similar in every respect to that of two years ago, except you will have to wait for the sale of the land to receive your money. . . . C.T. at 37, July 25, 1903.

The objections to the former agreement was not on account of the price, but to the manner of payment. . . . C.T. at 50, July 25, 1903.

There has been a sentiment growing in Congress for a number of years past, and is now stronger than ever against paying Indians for ceded land direct from the U.S. Treasury. That is what is referred to in my letter of instructions, which I read you, as being a new departure in the manner of disposing of the surplus lands of Indian reservations, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands, they will be paid from the proceeds of the sale of lands ceded; the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such a manner as will secure to the Indians the highest price obtainable. This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made with the Indians, by which they will receive a lump-sum consideration for the tract ceded. . . .I am here to enter into a new agreement, from which you will receive as much for your lands as the agreement of two years ago provided, but the manner of disposing of it is different. . . .The Government collects from the homesteader and pays it over to you. . . .*You will still have as large a reservation as Pine Ridge after this is cut off*. . . . C.T. at 5, 12, 22, July 30, 1903 (emphasis added).

C. THE SCHOOL LAND PROVISION

In the court below your appellee pointed out the fact that the only treatment this school land provision had received in any of the briefs as of that date was a mere acknowledgement of its presence. For example, appellant below merely listed the provision in the "Lands exempted from sale and/or disposition" and "appropriations" sections of its brief. B.P. at 31-33, 41. But for the reasons stated in the Congressional Record and the Senate and House documents for its necessary inclusion in the original and amended 1901 agreement, no other treatment would probably have been warranted. When the provision is examined in light of these reasons, however, it is your

appellee's position that it assumes such an added degree of significance as to constitute one of the most enlightening provisions to be found in any of the acts.

As appellee has discussed at 12, *supra*, on the first day the original 1901 lump-sum cession agreement was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the school land provision. 35 Cong. Rec. 3187 (1902).

As Senator Gamble explained to the Senate:

Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. *This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain.* This would withdraw about 29,000 acres of these lands and would leave 387,000 acres to be opened to settlement, which would be affected by the proposed amendment. Cong. Rec., *supra* (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.* Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The Committee of Indian Affairs first suggested the school provision when the bill was pending before it, even though Senator Gamble felt that the provision itself was superfluous as the grant to the state would become operative without further legislation when, in his words, the "*reservations were opened, as in this case, and became a part of the public domain. . . .*" 35 Cong. Rec. 4856 (1902) (emphasis added).

Certainly Congress, at the time of this debate, had intended the 1901 agreement to disestablish a portion of the Rosebud Reservation, and so the "public domain" and "extinguished reservation" concept is understandable. After all, Congress was concerned with the original 1901 lump-sum cession agreement which your appellee has established would have had this effect on the Rosebud Reservation. In other words, at least as far as the Rosebud Reservation is concerned, Congress had not as yet, as appellant below stated, abandoned this policy in favor of the "new" policy, i.e. the trustee-homestead amendment.

But why is this school land provision, founded as it is upon a provision made operative *only*

when " the reservation shall have been extinguished and such lands restored to, and become a part of, thepublic domain," still present in the final act representing the "new" policy which purportedly did not diminish or extinguish reservations? And what is Congressman Burke doing explaining the school land provision to the House of Representatives on January 30, 1904, *after the adoption of the new policy*, in not only the same descriptive terminology of the old policy which appellant below argued had been abandoned, but also in terms of the same diminutive or extinguishing concept the 1901 agreement would have had on the reservation!

> Mr. FINLEY: Mr. Speaker, I observe that in section 4, reserving school lands, it is provided that the government pay for those lands. Is that the usual appropriation that is put in all bills of this character?
>
> Mr. BURKE: I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and *it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain*. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay outright of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty.
>
> Mr. FINLEY: Then, as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union.
>
> Mr. BURKE: Yes.
>
> Mr. FINLEY: And not otherwise?
>
> Mr. BURKE: No. 38 Cong. Rec. 1423 (1904) (emphasis added)

Precisely the same underlying reason for the inclusion of this school land provision in the final act, namely that the act would extinguish that portion of the reservation and hence make operative the enabling act, is also given in all of the House and Senate Reports submitted *after* the adoption of appellant's "new" policy:

> The bill also provides that sections 16 and 36 or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 3839,

> 57th Cong. 2d Sess. 2 (1903).
> The bill also provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that in any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. S. Rep. No. 3271, 57th Cong. 2d Sess. 2 (1903).
>
> Section 4 of the bill provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 443, 58th Cong., 2d Sess. 2 (1904).
>
> Section 4 of the bill provides that section 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act, which provides that in any reservations opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. S Rep. No. 651, 58th Cong., 2d Sess. 2 (1904).

The connotation of the "open to settlement" terminology has been discussed at 23, *supra*

Appellant's arguments, both in the court below and in this Court, regarding the school provision have been discussed and disposed of at 24, 25, 26, *supra* In addition thereto appellee would note that irrespective of what equitable interest the members of the Rosebud Sioux Tribe may have retained until the proclamation opened the land to settlement and irrespective of what precise moment said lands were actually and technically restored to the public domain, the import of the Congressional Record and the Senate and House Reports *specifically concerned with the Rosebud Reservation and this section of the 1904 Act is totally clear and unambiguous: that portion of the Rosebud Reservation affected by the 1904 Act was being disestablished by the 1904 Act.*

D. THE FINAL REPORTS: SENATE REPORT NO. 651 AND HOUSE REPORT NO. 443

The legislative history of each of the three Rosebud Acts contains so much material that is specifically and blatantly contrary to the undiminished reservation theory that even appellant can not devise or structure a plausible argument to explain it away. One such example is the final reports on the 1904 Act.

Senate Report No. 651 and House Report No. 443 are one and the same, as the Senate Committee on Indian Affairs deemed the subject matter of the measure to be so "fully covered" (S.Rep. *supra* at 1) by House Report No. 443, they adopted it in its entirety. The report and appended materials consist of some 12 pages that relate, in detail, the history of the Gregory County Act. Although appellee deems the entire report to be extremely significant and has in fact discussed certain aspects of it elsewhere in this brief, only two areas will be examined at this point. Keeping in mind that the general purpose of this subsection was to show that Congress never intended that the trustee-homestead amendment would in any way affect the diminution of the Rosebud Reservation which appellee has established would have occurred had the original 1901 lump-sum cession agreement been ratified, your appellee notes and deems significant the following paragraph:

> There is no question but what the Indians have no use for the land that is proposed tobe ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, *which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, inSouth Dakota.* S. Rep., *supra* at 3 (emphasis added).

This paragraph, especially when considered in connection with not only the tenor of the Commissioner of Indian Affairs testimony before the House Committee, but also the specific reply he made when asked about the advisability of consent (i.e., "If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations.") (S. Rep., *supra* at 4-5 [emphasis added]) which was also reproduced in the report proper,[9] not only deals with the precise effect the 1904 Act was to have on the Rosebud Reservation, but also serves to put the issue in what appellee would term a proper historical perspective.

Both reports represent the final word of the Senate and House Committees on Indian Affairs, and in effect, of Congress itself.

The House passed the bill on February 1, 1904, after a short explanation by Congressman Burke, the significant portion of which has already been discussed inthis brief. On April 18, 1904, the entire report was first read by the Secretary, and the bill passed the Senate without any discussion whatsoever.

Appellant has failed to address any portion of its brief, either in the court below or in this

9. By "report proper," your appellee means that portion of the report exclusive of the appended material.

Court, to this unequivocal and very significant report to Congress of what was to be a new Rosebud Reservation.

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

One would logically assume that if, *after* the 1901 agreement had been amended to include the trustee-homestead provision, a portion of the reservation was *still* to be "cut off," "extinguished," and "restored to the public domain" and that portion remaining to be left "compact and in a square tract" and "still as large as" or "about equal in size to the Pine Ridge Reservation," as Inspector McLaughlin, Congressman Burke, Senator Gamble, and the language and provisions of the act and reports indicated, there should be some confirmation of this diminutive effect in documents and statutes concerned with Gregory County and the Rosebud Reservation *after* the act had been passed and proclamation issued. C.T. at 22 (1903); 38 Cong. Rec. 1423 (1904); H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904). (Cited sources describing the effect of the 1901 agreement *after* it had been amended to include the trustee-homestead provision i.e., the 1904 Act.)

The appellee submits that, in its *entirety*, the judiciary could not expect a more *relevant, consistent, clear, immediate and unequivocal* confirmation of this sort than the 1905 "extension" statute and peripheral materials concerned therewith.

1. 1905 Extension Statute

   a. S.Rep. No. 2760, 58th Cong., 3rd Sess. 1 (1905):

> The Committee on Public Lands, to whom was referred the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which *were heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, S. Dak., having had the same under consideration, beg to leave to report the bill back with the recommendation that it be amended, and that as amended it do pass. . .
>
> The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904. . .(emphasis added).

   b. H.R. Rep. No. 4198, 58th Cong., 3rd Sess. 1 (1905):

> The Committee on the Public Lands, to whom was referred the bill (S.5799) to

provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, S. Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it do pass.

The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904. . . . (emphasis added).

c. 39 Cong. Rec. 1578 (1905) (remarks of Senator Gamble on S. 5799, on Jan. 30, 1995):

Extension of Time to Homestead Settlers.

Mr. GAMBLE. I ask unanimous consent for the present consideration of the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands *which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County*, S. Dak. . . (emphasis added).

d. Act of February 7, 1905 (S. 5799) ch. 545, 33 Stat. 700: An Act To provide for the extension of time within which homestead settlers may establish residence upon certain lands which were *heretofore a part of theRosebud Indian Reservation within the limits of Gregory County, South Dakota*

> Be it enacted. . .. That the homestead settlers on the lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, opened under an Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provisions to carry the same into effect, approved April twenty-third, nineteen hundred and four. . .be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened. . (emphasis added).

e. 33 L.D. 408 (1905):

Instructions

Department of the Interior,
General Land Office
Washington, D.C., Feb. 9, 1905

Register and Receiver,

Chamberlain, South Dakota. . . .

Gentlemen: The Act of February 7, 1905, provides –

That the homestead settlers on the lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, opened under an act entitled " an Act to ratify and amend an agreement with the Sioux tribe of Indians of theRosebud Reservation. . . ." be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the first day of May, anno Domini nineteen hundred and five. . . .

You will see that as to lands in the *former* Rosebud Reservation. . . . this act is given effect in your office as to all entries made of such lands prior to

November 1, 1904. W.A.Richards, Commissioner

Approved: E.A. Hitchcock,
Secretary
(emphasis added).

The court below cited the above materials as a "clear indication," a "clear expression," that Gregory County had ceased to be considered in the "congressional mind" as reservation and "that the Congress of the United States considered the reservation nature of Gregory County extinguished." A.A.I. at 46-47.

Although appellant has quoted the *Mattz* opinion to this court as follows: " '[S]ubsequent legislation usually is not entitled to much weight in construing earlier statutes.' *Mattz v. Arnett,*" (B.A. at 59) to support its assertion that "the subsequent enactments are inconsistent, inconclusive and for that reason not a reliable indicator of Congressional intent," appellee is confident that this Court is completely aware as was the lower court that the complete statement of the United States Supreme Court in *Mattz* was "although subsequent legislation usually is not entitled to much weight in construing earlier statutes, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, (1968), *it is not always without significance.*" 392 U.S. 157, 170 (emphasis added). Other miscellaneous documents which also attributed this same diminution to the 1904 Act. (See Appendix at 86, 87).

As appellee stated to the court below, this list of "former" references is not and was not intended to be complete in the sense that it includes all references of a later date concerned with the Gregory County opening. Nor is it intended that because of the "former" references such an intention must be "imputed" back to the 1904 Congress. Rather, the references are merely intended as a confirmation that the diminutive effect attributed to the 1904 Act before passage was recognized after the act was effective. [10]

The list is therefore to be considered only as additional support for what was in the court below and still remains appellee's primary contention in this Court: that the legislative history and the text of the 1904 Act, considered together and in their entirety, are sufficient to show that the 1904 Act was intended to diminish the Rosebud Reservation. The court below used one of the above references for precisely this purpose when at page 24 of its opinion it stated that the transcript "adds weight" to its conclusion that the 1904 Act diminished the Rosebud Reservation and cited

Inspector McLaughlin. . . .There is no railroad running over any portion of the

10. 1907 and 1910 confirmation sections are intended to be equally within the purposes and limitations stated in this paragraph.

> Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory County whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments. So you need not worry about that , my friends. "Dec. 14, 1906, *Rosebud Agency Hearing* by James McLaughlin, U.S. Indian Inspector, page [5]." A.A.I at 51.

Appellant has jumped all over the court below and devoted over two pages of its brief to show that:

> The quotation set out in the opinion is intended to show that when McLaughlin in 1906 said that a railroad in Gregory County 'has not yet come across your reservation boundary***, it meant that McLaughlin considered the 1904 Act portion of Gregory County to be outside of the reservation and therefore the statute meant the same thing. The conclusion is not supported by the record or by McLaughlin's complete statement, . . .
>
> The record does not show whether, by 1906, an additional rail line had been built into the 1904 Act portion of Gregory county.
>
> McLaughlin's statement, read in context, does not support the trial court's conclusion that 'McLaughlin's assumption was that Gregory County was no longer a part of the Rosebud Sioux Reservation.' (B.A. at 52,52.)

asserting that this was "another example of the inappropriate use" of later materials to show "1904 Act intent." B.A. at 52.

In the first place the court below explicitly stated the reference quote only "adds weight" to the court's conclusion that the 1904 Act had in fact diminished the Rosebud Reservation. A.A.I at 50.

Secondly, and more importantly, the *record does show* and shows *clearly, contrary* to the assertions of appellant, that, by 1906, an additional rail line had been built into the 1904 Act portion of Gregory County. On page 20 of appellee's brief below, immediately after Inspector McLaughlin's statement the following documentation of that fact appears:

> 6. YESTERDAY AND TODAY: A HISTORY OF THE CHICAGO AND NORTHWESTERN RAILWAY SYSTEM, at 133 (1910). The following quotation from the annual report for fiscal year *1906* appears therein:
>
> > The company had also undertaken the construction of an extension from Bonesteel, South Dakota to Gregory, South Dakota, a distance of 25.93 miles, and would be complete during the ensuing fiscal year. This extension will *pass through Gregory County*, which embraces that portion of the Rosebud Indian Reservation *opened to settlement in 1904*, and will terminate near the *present* eastern boundary of that

> reservation (emphasis added).

It would thus appear that the only "inappropriate use" of material would be the two pages of appellant's brief devoted this wholly unsuccessful attempt to discredit the court below.

1907 ACT [11]

If appellee's position as to the effect of the 1904 Act on the Rosebud Reservation is correct, the materials surrounding the 1907 Act should not only independently support this position but should also indicate a similar effect was intended by the 1907 Act itself. Since the 1907 documents enable one to view the effect of the homestead acts on the Rosebud Reservation both retrospectively and prospectively; they will be analyzed from that vantage point. The format will consist of the same three interrelated subheadings used in the discussion of the Gregory County Act.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE-HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTATION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM AGREEMENT

The pillar of appellant's new policy, the trustee-homestead amendment, had been in effect for three years on the Rosebud Reservation and was about to be implemented again. Yet not one paragraph appears in any of the contemporary documents that clearly supports its concept of a reservation. Even in light of the fact that three years had passed since the "new policy" was applied to the Rosebud Reservation, one would expect at least some sort of casual remark or other manifestation from someone.

II. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1907 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 ACT

A. CONTINUITY

If there is one striking characteristic that permeates all of the Rosebud materials from the

11. Act of March 12, 1907, 34 Stat. 1230–all of Tripp County and a portion of Lyman County.

conception of the original 1901 lump-sum cession agreement through thepassage of the 1910 Act, that characteristic is continuity: A continuity of terminology, procedure, personnel, and most importantly, policy.

1. Terminology. The "cession" and "open" terminology continues to appear throughout the documents of the period and is used interchangeably with and equated to the "sale and dispose of" terminology. In one paragraph reference is made to "the sale of that part of Reservation located in Tripp County" and in the next to the disposal of the "land ceded," *ad infinitum*. Letter from F.E.Luepp, Commissioner of Indian Affairs to Inspector James McLaughlin, December 5, 1906.

2. Procedure. The Secretary of the Interior again requested the Office of Indian Affairs to "prepare instructions" for Inspector McLaughlin to enter into "negotiations with the Rosebud Indians for the *cession*" of certain land in South Dakota and Inspector McLaughlin was thereby detailed in the precise same manner as in 1901. Letter from F.E. Leupp, Commissioner of Indian Affairs to the Secretary of the Interior, December 5, 1906 (emphasis added). The instructions referred to fair terms, "similar to those in the disposal of the ceded lands in Gregory County." Letter to Inspector McLaughlin, *supra*. Inspector McLaughlin explained the purpose of his visit in the same manner: "I am here under orders of the Secretary of the Interior to submit to you a proposition for the cession of your surplus unallotted land in Tripp County." A.A.III, doc. 19 at 1. As in 1901, an agreement was reached wherein a majority of the members of the tribe agreed to "cede, grant, and relinquish to the United States all claim, right, title and interest in and to all that part of the Rosebud Indian Reservation lying. . ." S. Rep. No. 6831, 59th Cong., 2d Sess. 1 (1907). Article II of the agreement provided that:

> In consideration of the lands ceded and relinquished by Article I of this agreement, the U.S. stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead and townsite laws, or by sale for cash, and shall be opened. . . . S. Rep., *supra*

If the trustee-homestead policy was inconsistent with the "cede, grant, and relinquish to the United States all right, title and interest in" policy, as appellant still maintains, the Secretary of the Interior, the Office of Indian Affairs and Inspector McLaughlin certainly were not aware that such a distinction should apply to the Rosebud Reservation.

The Office of Indian Affairs and the Secretary of the Interior attempted to make the legislation conform with the expectations of the Indians. Both recommended that the agreement be ratified with only those changes necessary to make it effective. S. Rep., *supra* at 4. On February 18, 1907,

the Senate Committee on Indian Affairs concurred and Senate Report No. 6831 was submitted with the agreement basically intact. S. Rep., *supra*. However, at approximately the same time a bill substantially in theform of the final act had already passed the House. So the very next day the Senate Committee on Indian Affairs adopted the House bill, which was not in the "form" of the agreement, and the House report, which only appended the agreement. S. Rep. No. 6838, 59th Cong., 2d Sess. (1907). But for the fact that the other version had already passed the House, the *1907* Act could very well have ended up in the same form as the Gregory Act–a form containing the terminology of and representing a policy which according to appellant had long since been abandoned on the Rosebud Reservation. [12]

In any event, the fact that an agreement containing this "old" terminology was appended to and made part of theSenate and House reports is, in and of itself, significant. In addition, many of the provisions of the agreement were simply paraphrased and made a part of certain sections of the final act. [13]

3. Personnel.Many of the individuals responsible for the Rosebud legislation in 1907 were the same individuals that were responsible for the 1904 legislation. For the most part they were thoroughly familiar with the history of the Rosebud legislation, some even from the time of the 1901 agreement. This is additionally persuasive in light of appellant's citation that " 'It is the sponsors that we look to when the meaning of the statutory words is in doubt.' " B.A. at 59. In this respect, the references to and provisions of the acts which are inconsistent with the continued existence of certain portions of the Rosebud Reservation become even more of an anomaly. See Note 4, *supra*.

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12. Perhaps the reason why the House did not ratify the agreement *in toto* was that it had to be amended. In such a case, Inspector McLaughlin has succinctly stated in the very last paragraph of his report that:

> I desire to add that quite a number of the Indians before signing the agreement expressed themselves as fully concurring in all its provisions, but wanted it distinctly understood that should the agreement fail or ratification just as it was written, they did not wish their names transferred to appear as concurring in H.R. bill 20527, 59th Congress, 2d Session, or any other bill of a similar character, which they imagined was done with their signatures to the unratified agreement of September 14, 1901, when Gregory County lands were opened by the Act of April 23, 1904. Letter from Inspector James McLaughlin to the Secretary of the Interior, February 12, 1904.

13. The articles in the agreement were prefaced with "It is further agreed. . ." and "It is understood. . . ." In all instances the remainder of the provisions were then retained *in toto*. For example, compare the school land provision in the agreement and the final act. In essence, as Congressman Burke stated, the whole act was "substantially in accordance with an agreement which has just been made with the Indians. . .." 41 Cong. Rec. 3104 (1907).

In all instances, the 1907 bill and agreement were referred to as being "the same as" or "in line with" or substantially "similar to" the 1904 Act. C.T. at 31 (1906); 41 Cong. Rec. 3104 (1907); Letter to Inspector McLaughlin, *supra*. And the 1904 Act was consistently referred to by these men in such a manner as toleave little doubt that Gregory County was simply no longer considered to be a part of the Reservation. For example, there is Inspector McLaughlin's comment about the railroad set forth at 20, *supra*, and also the continual reference to Tripp County, not Gregory County, as *the* eastern part of the Reservation

> High Pipe: The best land we have is in *the eastern part* of our reservation, Tripp County. C.T. at 8 (1906) (emphasis added).

The agreement itself, the House and Senate Documents, and the Congressional Record also support this conclusion:

> cede, grant, and relinquish to the United States all claim, right, title, and interest in and to *all that part of the* Rosebud Indian Reservation lying south of the Big White River and *east*. . . .S. Rep. No. 6838, 59th Cong., 2d Sess. 4 (1907) (emphasis added).

> The purpose of this bill is to authorize the opening and sale of that portion ofthe Rosebud Reservation in South Dakota known as Tripp County, and it affects *all that portion of the reservation east* of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as *was* located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 1 (1907)(emphasis added).

> The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects *all that portion of the reservation east* of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as *was* located inGregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. S. Rep. No. 6838, 59th Cong., 2d Sess. 1 (1907) (emphasis added).

But for the discrepancy in acreage, it otherwise appears that if appellant's theory of an undiminished reservation is correct, Congress would be reselling and reopening that same portion of the Rosebud Reservation that had been opened and sold in 1904! Fortunately for the homesteaders and allottees in Gregory County, Gregory County was not a part of the Rosebud Reservation in *1907* and as the material in the next sections indicate Tripp County would soon be similarly located.

B. THE CENTRAL THEME

The three sources cited below are an example of what your appellee has attempted to stress throughout this entire section: that the central theme present in all of the Rosebud documents of this period is a concept of a reservation already diminished by one act, and soon to be diminished by another.

1. Commissioner of Indian Affairs. On December 15, 1906, F.E. Leupp, the Commissioner of Indian Affairs, submitted a 12 page report to the Secretary of theInterior on a bill that was them pending to dispose of that part of the Rosebud Indian Reservation in Tripp County, South Dakota. On the last page therein, he stated in simple and concise terms that:

> I have heretofore said in substance that, in my judgement, it is a mistake for Congress to direct the *restoration of the surplus lands* of an Indian Reservation *to the public domain* without first referring the question to the Indians. . . .Letter from F.E. Leupp, Commissioner of Indian Affairs to Secretary of the Interior, December 15, 1906 (emphasis added).

If the presence of the trustee-homestead provision in the Rosebud legislation was inconsistent with the restoration of lands to the "public domain," and hence inconsistent with the doing away with reservations, someone certainly should have communicated this information to the Commissioner of Indian Affairs. In addition, appellee would submit that the probative value of statements such as this is enhanced by the fact that this Commissioner was not a novice in these matters. Indeed, this is the same Commissioner who used the "doing away with reservations" terminology *after* the adoption of the trustee-homestead provision while testifying before the House Committee on Indian Affairs in *1904*, which was included, along with his report on the final draft on the 1904 Act, in both the 1904 Senate and House Reports.

2. The School Land Provision. Section 6 and 7 of the 1907 Act specifically provided that certain lands granted to the state be paid for by the Federal Government. The members of the House and Senate who were not as familiar with the Rosebud legislation as others more directly involved, were *consistently* and in all instances given the same explanation for this appropriation. A portion of the reservation would be extinguished by the 1907 Act (Tripp County), as portions thereof had been extinguished before, and a section of the enabling act required in such cases that land then be granted to the state. When Congressman Burke presented the bill to the House the following exchange took place:

> Mr. Finley. Does not the gentleman think that the State of South Dakota should have

land for school purposes, as is provided in the bill, and that the Government should pay for the land?

Mr. Burke of South Dakota. I will answer that question by stating that in at least six different instances since South Dakota was admitted into the Union Congress has made an appropriation and paid for the school sections under the *guaranty that was given* to the State when we came into the Union.

Mr. Finley. Why is that where certain sections have been allotted or patened the Government is called upon to pay for sections 16 and 36?

Mr. Burke of South Dakota. That refers to sections that have been allotted to the Indians, and it has always been the custom where school sections have been allotted to give to the State in lieu of such sections other sections, not exceeding two in any township.

Mr. Finley. Is it true that some of these lands have been allotted to the Indians?

Mr. Burke of South Dakota. It is true that a portion of the lands have been allotted to the Indians.

Mr. Finley. Does the gentleman think theGovernment should be called upon to pay to the State of South Dakota for lands allotted to the Indians? Doesn't the land belong to the Indians? I ask the gentleman if that practice has been the usual one?

Mr. Burke of South Dakota. We have heretofore appropriated to pay for sections 16 and 36 in every township, or where they had been taken to pay for a section in lieu thereof.

Mr. Finley. Has that been the rule where lands are allotted to Indians?

Mr. Burke of South Dakota. Yes; that has been the rule and was the rule in the former Rosebud bill which passed the Fifty-eighth Congress, and is exactly in line with this provision, and the price is the same. 41 Cong. Rec. 3104 (1907).

Although Congressman Burke could have explained the necessity for the inclusion of such a provision more succinctly as he had in other instances, an examination of the House and Senate reports reveals why such a detailed statement in this instance would have been superfluous. One entire page of each of these reports is devoted to this very question:

> Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the *precedents* which have heretofore been established in the *opening* of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> SECTION 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor indemnity provisions of this act, nor shall any lands

> embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands restored to and become a part of the public domain*
>
> The following are the *precedents*:
> By section 30 of the act opening and dividing the *Great Sioux Reservation*, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L. 898.)
>
> By section 30, act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L. 1039.)
>
> By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L. 313.)
>
> Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for at $2.50 per acre, and act authorizing sale of a portion of the Lower Brule Reservation, first session of the (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S.Rep., No. 6838, 59th Cong., 2d Sess. 3 (1907) (emphasis added).

Whether one prefers the "opening" of the 1889 Reservation or the "sale" and "cede" of the 1904 Gregory County Act or whatever, the 1907 Act *was intended by Congress* to extinguish that portion of the Rosebud Reservation lying in Tripp County and restore it to the public domain in the same manner. It is with this in mind, as well as Commissioner Leupp's statement that appellee now turn back to a comment made by Congressman Burke on the floor of the House.

3. The Congressional Record. Certain statements appear throughout the Rosebud documents that the counties submit are susceptible of only one interpretation when viewed in their proper historical perspective and in light of the information stated in the other contemporary documents dealing with that reservation. Congressman Burke made just such a statement on the floor of the House on February 16, 1907:

> The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. *They will have left, after this land is disposed of, a reservation that is substantially 50 miles square, and there are only 5,000 Indians.* 41 Cong. Rec. 3104 (1907) (emphasis added).

This statement is the perfect example of how the serial effect of the Rosebud homestead acts can be viewed both retrospectively and prospectively. Retrospectively, Gregory County was no longer a part of the reservation. Prospectively, Tripp County would soon be similarly located.

This quotation was presented by appellee to the court below in its brief at 27 and this is precisely the same manner in which the court below viewed the statement:

It can been seen, upon examining a map, that the quotation '50 miles square' referred to in the quote relates approximately to the size of the reservation minus Gregory, Tripp and Lyman Counties. Mellette and Todd County make up a generally square area, roughly 50 miles on a side. Again, one can see thecontinuous policy with relation to theRosebud Indian Reservation and opening the reservation, diminishing the reservation, and extinguishing the reservation nature of the lands concerned. A.A. I at 54.

Here is a sponsor of the 1907 Act, one, as stated in appellant's brief " 'that we look to when the meaning of the statute's words is in doubt.' " referring the whole House to a "reservation substantially 50 miles square," blatantly in opposition to appellant's whole theory in this case, cited and heavily relied upon by the court below, –and what is appellant's response? Again, appellant has failed to address any portion of its brief, either in the court below or in this Court, to this unequivocal and probative evidence of congressional intent.

Instead, it devotes another two pages of its brief to attacking yet another portion of the opinion of the court below:

The district court misconstrued the allotment . . .

> In the third place, in drawing its parallel with *Mattz*, the district court incorrectly read the allotment language of the Rosebud 1907 Act . . .*the district court incorrectly read the allotment language of Section 2 of the 1907 Act* . . . B.A. at 23, 25. (emphasis as in original).

which concludes with "Had Congress intended to dissolve the reservation status of the Tripp county portion of the reservation, it hardly would have provided for 160 acre allotments anywhere on the reservation, including Tripp County." B.A. at 27. The actual provision to which appellant refers is Section 2 of the 1907 Act:

> . . .Provided, that prior to said proclamation, the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotments and to receive in lieu thereof an allotment anywhere within said reservation. . . . Act of March 12, 1907, Sec. 2, 34 Stat. 1230.

Evidently appellant has prefered to set forth in its brief what it views as a more favorable paraphrased version, rather than the section of the act itself. B.A. at 26. In any event, this section does not support the position of the appellant in any way. The reason for the somewhat awkward reading of the provision as compared to the explicit language of the 1910 Act, is because of a special set of circumstances which then existed on the Rosebud Reservation. As the Commissioner of Indian Affairs explained to Inspector McLaughlin in his instructions:

> The Office is in receipt of a communication of November 22, from Hon. Charles H.

> Burke, wherein he says that he recently visited the Rosebud Reservation for the purpose of gaining information with a view to preparing a bill for the sale of that part of the reservation located in Tripp County; that he found that a large number of Indians had taken allotments in the western and southwestern parts of the reserve, and on lands which are now, and always will be,worthless, being nothing but sand hills; that the Indians who have allotments in the reservation elsewhere than in Tripp County should be permitted, in the discretion of the Secretary of the Interior, to relinquish them and to take allotments in lieu thereof in some other part of the reservation, including Tripp County; A.A. III, doc. 18 at 4.

In the first instance, of course, Tripp County was a part of the reservation –at the time of the instructions– at the time the bill was written –at the time the reports were made –and for purposes of allotment it would continue to be a part of thereservation until the act was passed and the lands opened to settlement.

Secondly, Gregory County, the eastern part of the original reservation was not within, directly or indirectly, the purview of this section which was designed to alleviate a condition in the *western* and southwestern parts of the reserve. The provision would, in addition, as the court below stated, still allow the Indians in the portion soon to be opened, to relinquish and remove to the diminished portion of the reservation –if they wanted to so remove.

Finally, but for the special conditions the very section which appellant thought in some way supported its argument, could very well have contained the same terminology of the 1910 Act –a terminology that definitely does not support its position. Therefore, in light of the reasons for the special wording of this 1907 section, and the context within which the court below was comparing it and a similar section of the 1910 Act to a portion of the *Mattz* opinion, the court below did not misconstrue this or any other section of the 1907 Act and its construction is *not* "in direct conflict with the plain language of the 1907 Act and the committee reports," as appellant has ascerted. B.A. at 26. Its opinion that:

> The allotment sections, the school land provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and the subsequent congressional enactments for each act lead this Court to believe and be of the opinion that the surrounding legislative history and the circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or 'Indian land' nature of those counties thereafter. . .A.A.I at 74-75 (emphasis as in original).

is as well founded and sound today as it was when it was written.

III. THE DOCUMENTS AND STATUTES CONCERNED WITH TRIPP COUNTY AFTER THE PASSAGE OF THE 1907 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN

1. 37 L.D. 124 (1909):

OPENING OF ROSEBUD INDIAN LANDS IN SOUTH DAKOTA (TRIPP COUNTY).

Regulations

Department of the Interior
Washington, D. C., Aug. 25, 1908.

The Commissioner of the General Land Office.

Sir: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation and entry of certain lands *formerly* within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230). . . .

Very respectfully,

Jesse E. Wilson,
Acting Secretary
(emphasis added)

2. EIGHTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1908. V. STATE DEPT. of HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 45 (1910):

Perhaps the most noteworthy event ofthe year 1908 in South Dakota has been the opening to settlement of the unallotted lands in *Tripp County, formerly a portion of the Rosebud Indian Reservation.* Pursuant to an act of Congress providing for the opening of these lands, the President in September issued his proclamation, directing that from October 7 to October 17 parties desiring to locate homesteads upon the Tripp County lands be permitted to register for the chance of drawing a homestead at Dallas, Bonesteel, Chamberlain or Presho, and during the period designated 114, 769 registrations were made, though there were but about four thousand homesteads available. The registrations exceeded the former rush to Gregory county lands in 1904 by more than eight thousand. . . (emphasis added).

3. Report to the Commissioner of Indian Affairs, Annual Report of theRosebud Agency, C.L. Ellis, Agent, 21-27 (1909):

. . .The Rosebud agency is located on the southern boundary of South Dakota.

Originally the reservation extended to the Missouri river onthe east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservation, was ceded and the surplus or unallotted lands made availagle for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and *east of the present diminished* reservation was opened to settlement. . . .

What is now known as the *diminished* reservation is a tract about 50 miles square embracing the western part of the original reservation. . . .

If the whole of the *diminished* reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious. . . .

The diminished reservation, containing about 2500 square miles, is wholly a cattle range at present. . . .

The burning of the grass on a great part of Tripp County early last winter found many of the cattlemen's stock to seek grass on the *diminished* reserve. . . .

In order to keep the cattle of the *diminished* reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to construct a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended inrepairing the fences on the other *three* sides of the reservation this season and they are now in good condition.

All the other day schools are located in the *diminished* reservation. . . .

Many new towns have sprung up near the reservation boarders and in Tripp County. . . .

C.L. Ellis
Special Indian Agent
in charge
(emphasis added).

4. Report of the Commissioner of Indian Affairs, 42 (1909):

Rosebud, S. Dak.—This reservation has been *diminished* very rapidly within the last few years by various acts of Congress. . . .

Respectfully,
Robert G. Valentine
(emphasis added).

See Appendix at 83, 84, 85, 86.

1910 ACT [14]

The 1910 materials are the most valuable documents for presenting what appellee would prefer to term, a proper historical perspective of the Rosebud legislation. Not only is the retrospective-prospective aspect discussed in the 1907 section more pronounced because of the

14. Act of May 30, 1910, 36 Stat. 448—All of Mellette County.

passage of time, but also herein lies the first history of the Rosebud legislation related by those members of Congress primarily responsible for the three acts.

Again, the format for presenting the 1910 materials will consist of the same three interrelated subheadings used in the discussion of the 1904 and 1907 acts.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE–HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP–SUM CESSION AGREEMENT

In light of the fact that the documents in this section set forth the entire history of the Rosebud legislation, one would expect that the elusive concept upon which appellant has premised its argument would at least be mentioned somewhere in these 300 odd pages–but it is not. Indeed, appellee has been unable to locate and appellant has not cited even one paragraph stating this concept in any of theRosebud douments concerned with the three acts.

II. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1910 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH YOUR APPELLANT HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP–SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 and 1907 ACTS

A. CONTINUITY

To a large extent, the continuity that has manifested itself throughout the history of the Rosebud legislation is still apparent in the documents surrounding the 1910 opening.

Some of the men concerned with the earlier Rosebud legislation were no longer in Washington, but the two most influential still remained: Senator Gamble and Congressman Burke. Inspector McLaughlin, although now presenting the proposals only to procure the Indians' views and not to obtain a signed agreement, was still negotiating with the Rosebud Indians in formal council at the Rosebud Agency.

The most striking evidence of continuity of policy can be gleaned from the remarks of various individuals and documents concerned with what then constituted *the* reservation. In the

1907 subsection on continuity appellee stressed that Gregory County was simply no longer considered a part of the reservation and Tripp County would soon be similarly located. The 1910 materials support this conclusion without exception.

1. The Eastern and Northern Part. In 1901, the Indians and Inspector McLaughlin referred to Gregory County as *the* "eastern part" of the reservation. In 1906 *the* "eastern part" of the reservation was Tripp County. Now, in 1909-1910, the Indians and Inspector McLaughlin continually refer to certain townships located immediately *west* of Tripp County as *the* "eastern part of our reservation." C.T. at 6 (1909). In this connection, they are joined by none other than the Secretary of the Interior, James Rudolph Garfield, who refers to this same strip of land as not only being *east* but also in the *diminished* reservation – i.e. "on the *east* of the present *diminished* reservation." S. Rep. No. 887, 60 Cong., 2d Sess. 3 (1909) (emphasis added). (The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909.)

Corresponding to this "eastern" concept are the other references to the area to be opened by the 1910 Act as constituting the entire "northern part" or the "north part of our reservation." C.T. at 8,20 (1909). Almost without exception, appellant has not even attempted to explain away or circumvent the implications of this or similar congressional material contained in the House and Senate documents discussed immediately below.

2. The Senate and House Documents. This same concept of precisely what the boundaries of the Rosebud Reservation encompassed was also present in Congress. In 1909 the Senate Report on the pending legislation stated that: "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres." S. Rep. No. 887, 60th Cong., 2d Sess. 1 (1909). Later, on the floor on the Senate, Senator Gamble remarked that "the Rosebud Indians have a reservation of nearly 2,000,000 acres." 43 Cong. Rec. 1679 (1909). The Senate Report of the 1910 bill reiterated that: "the present area of the Rosebud Indian Reservation aggregated about 1,800,000 acres." (S. Rep. No. 68, 61st Cong., 2d Sess. 2 [1910]), and the House report stated the same thing in more definite terms.

The appellee would submit that to have a reservation with a present *area* of approximately 1,800,000 acres, to refer to land west of Tripp County as the east part of the reservation and Mellette County as the north part of that reservation, is to have a reservation in Congressman Burke's words "that is substantially 50 miles square" and whose boundaries could not possibly encompass either Tripp or Gregory County. Only with this concept in mind, can one grasp the full import of the Secretary of the Interior's statement that "the Rosebud Reservation has been reduced

very rapidly during the last few years." Letter to Robert J. Gamble, *supra*.

Although primarily cited for the proposition that Mellette County was soon to be similarly located, some of the material in the next subsection should also be analyzed in retrospect as well as for the general evidence of continuity appearing therein.

B. A DIMINISHED RESERVATION

Three specific areas can be cited for the proposition that the 1910 Act was to further diminish the Rosebud Indian Reservation in precisely the same manner as the 1904 and 1907 Acts: (1) The Anticipatory Statements, (2) Specific References to what was to be the Diminished Reservation, (3) Provisions of the 1910 Act. This is the material to which the court below attributed "the clearest indication yet of the congressional intent to diminish the Rosebud Reservation" and from which it was able to state that there was

> no doubt in this Court's mind, after having reviewed the contemporary documents from the passage of the 1910 Act, and the congressional history thereof, that the Congress of the United States had the intention of diminishing the Rosebud Reservation. . . A.A.I at 73.

In the court below and again in this Court, appellant has failed to even discuss, much less circumvent, the bulk of this material anywhere within the over 100 pages of briefs submitted to date. Certainly the problem could not have been an unawareness of its existence, for all of this material was set forth in quotations inthe brief of appellee below,and your appellee is not aware of any inaccuracies with respect to substance or citations.

1. Anticipatory Statements. Appellee includes herein references such as:

> The *present* area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The lands proposed to be opened to settlement under the provision of this bill embrace an area of about 900,000 acres. . . The reservation is *yet* large. . . S. Rep. No. 887, 60th Cong. 2d Sess. 1,2 (1909) (emphasis added).

> The *present* area of theRosebud Indian Reservation aggregates about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of 830,000 acres. . The reservation is *yet* large. . . . S. Rep. No. 68, 61st Con,t., 2d Sess. 2 (1910) (emphasis added).

> The area comprised in thepresent bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There *will still be left* a reservation containing about 1,000,000 acres. . . H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . .The Rosebud Indians *have* a reservation of nearly 2,000,000 acres. A bill has been introduced and favoraly reported by the Interior Department, and a unanimous report made from the Committee on Indian Affairs, under which it is *proposed* . to open about *one-half* of the reservation to settlement. . . .43 Cong. Rec. 1679 (1909) (emphasis added).

> No U.S. Indian Inspector nor any other person or persons as yet has been authorized to explain this bill to us; therefore we would like to see someone that can give us at least a word security regarding the opening of any lands upon what *now* constitutes our reservation. Petition by Indians or the Rosebud Reservation (signed by Todd Smith and Reuben Quick Bear) to Hon. Wm. H. Taft, President of the United States, February 25, 1910 (emphasis added).

Such statements "anticipate" a *diminution* of the reservation of the type referred to specifically in the next subsection.

2. Specific References to what was to be the Diminished Reservation. By letter of April 29, 1909, Inspector McLaughlin reported to the Commissioner of Indian Affairs that the Indians expressed "their concurrence in the opening of the northern strip, provided the two tiers of townships in the eastern part of Meyer County remain a part of the *diminished reservation* " Letter from Inspector James McLaughlin to the Secretary of the Interior, at 3, April 29, 1909 (emphasis added). He also told the Indians specifically that "The opening of that part of your reservation will not only increase the value of the lands in that tract, but will also add a great deal to the value of the lands in your *diminished* reservation." C.T. at 14 (1909)(emphasis added). Other references of this nature include, but are not limited to, the following:

> I do not believe,therefore, that the strip of land on the *east* of the *present diminished reservation* should be opened yet. S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909). The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909 (emphasis added).

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment *within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished* S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> It also provides that the Secretary of the Interior, in his discretion, may permit Indians who have allotments within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere *within the reservation proposed to be diminished* S. Rep. No. 68, 61st Cong., 2nd Sess. 3 (1910) (emphasis added).

> The bill is carefully safeguarded and provides that Indians who have taken allotments in the area proposed to be disposed of may relinquish such allotments and be reallotted within the *diminished reservation*, if they so elect. . . .

> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. *There will still be left a reservation containing about 1,000,000 acres and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette county is disposed of.* H.R. Rep. No. 332, 61 Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

If there was no occasion for continuing a reservation larger than it would be when Mellette County was disposed of and the reservation was therefore to be diminished, one would expect the 1910 Act itself to contain not only provisions consistent with this objective but also provisions inconsistent with the continued existence of that part of the reservation affected by the 1910 Act – and indeed it does.

3. Provisions of the 1910 Act. Although the entire text of the 1910 Act is consistent with the concept of a diminished reservation, the counties will only discuss certain parts of sections 1, 2 and 8 at this point.

(a) Section 8: School Lands. The history of this provision and the necessity for its inclusion in the 1901 agreement, the 1904 Act, and the 1907 Act has already been set forth in detail at 5, 29-34, 51-55, *supra*. Therefore, it is necessary only to state that the same reason, namely the extinguished reservation and public domain section of the enabling act which would be made operative by the 1910 Act diminishing the reservation, was given for its incorporation into the 1910 Act:

> Sections 16 and 36 of the lands in each townships are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government *in conformity with the provisions of the act admitting the State of South Dakota into the Union.* S. Rep. No. 887, 60th Cong., 2d Sess. 2 (1909) (emphasis added).

> Sections 16 and 36 of thelands in each township are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government *in conformity with the provisions of the act admitting the State of South Dakota into the Union.* S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> There is also a provision reserving sections 16 and 36 of the lands in each township for the use of the common schools of the State of South Dakota, to be paid for by the Government at $2.50 per acre. The granting of these lands to theState is *in accordance with the provisions of the enabling act admitting South Dakota into the Union.* H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . .The Government agreed to reserve these lands and pay for them, not

> only by law, but *under the enabling act* admitting the State of South Dakota to the Federal Union. . . .
> Mr. Crawford. . . .Sections 16 and 36, to which the Senator refers, are held from the settler, and are given to the State to keep good the pledge made to the State by the Government *under the enabling act* when the State was admitted into the Union . .. .Mr. President, with reference to sections 16 and 36, they or their equivalent belong to South Dakota, because theGovernment of the United States granted section 16 and 36 to the State *in the enabling act* under which the State was admitted into the Union, as it has granted to states *over and over again millions of acres of public domain* for the establishment and maintenance of common schools. 45 Cong. Rec. 1068, 1071 (1910) (emphasis added).

(b) Section 1: Indian Agency, School, and Other Lands. As for the land reserved as long as "agency, school, or religious institutions are maintained thereon for the benefit of said Indians" (Act, *supra*, Sec. 1) to which appellant alludes, appellee can find nothing therein which is inconsistent with its position. After all, Congress was aware of the Indian population that was allotted within the "tract to be ceded" and certainly did not expect *all* of these individuals to "relinquish the same and select allotments in lieu thereof on the diminished reservation." Act, *supra*, Sec. 1. For Congress to provide for these Indians in this manner is not inconsistent with the fact that the area to be opened would no longer be a reservation. As the court below stated,

> Congress knew that various members of the Rosebud Sioux Tribe had taken allotments in the lands soon to be ceded, and these provisions attempted to continue to provide for those people in that area, although the land would no longer be considered as reservation. A.A.I at 69-70.

Appellant's assertion that "terminating the reservation status and setting land aside for future use for agencies to serve the Indians, for Indian school and for missions, all for the benefit of the resident Indians, cannot be reconciled with termination of reservation status." is not in accordance with the bulk of the contemporary documents of the period. B.A. at 21.

(c) Section 4: Timber Lands. At twenty-two of appellant's brief the following question appears:

> If, as held below, that portion of the reservation were being wiped out and Indian title extinguished, why reserve timber lands to the Tribe? Why leave the Tribe with vested interests? The opinion below was silent of the point. B.A. at 22.

A similar inquiry was also raised by appellant below and evidently the court below was satisfied with the answer that was submitted. Namely that the Congressional Record also supplied an answer to appellant's inquiry as to the reservation of timber lands toward the use of the Rosebud Indians:

> Mr. STAFFORD. Will the gentleman explain why he recommends an exception in

appraisement of mineral and timber lands?
Mr. BURKE of South Dakota. Because they are not to be disposed of. We are reserving them. Consequently we provide that they shall not be appraised. . . .
Mr. MONDELL. What is the gentleman's purpose in not disposing of the timber lands?
Mr. BURKE of South Dakota. We are providing in this bill and in the other bill that is exactly in the same form for reserving the timber land for the use of the Indians as a forest. *As a matterof fact, on this particular reservation there is not a single stick of timber, but the department seems to think the timber ought to be conserved*, and so we put this language in thebill.
Mr. MONDELL. You are conserving some timber that does not exist.
Mr. BURKE of South Dakota. So far as this reservation is concerned that is true, but we are establishing a precedent that might be good to follow in other reservations where there may be timber. . . .
Mr. BURKE of South Dakota. There is, as a matter of fact, no timber land in this reservation. We doubt if there will be found any lands that will be regarded as timber lands. But is was put in as a mere matter of precaution. 45 Cong. Rec. 5471, 5472 (1910) (emphasis added).

Even if the presence of this provision was other than merely precautionary, appellee would still be unable to discern any purpose other than one consistent with the acknowledgment by Congress of the continued presence of some members of the Rosebud Sioux Tribe in the area to be opened. In this light, the inclusion in the 1910 Act of some provisions for their benefit would seem to be entirely reasonable and not in any way inconsistent with the concept of a diminished reservation.

d. Intoxication Provision: At the conlusion of the section of appellant's brief on the intoxicant provision, appellant asserts that "Section 10 should have led the court below to the opposite conclusion." B.A. at 33. Yet nothing stated therein supports that assertion. The court below addressed a portion of its opinion in response to a specific question raised in the brief of appellant below: "And why did Congress specifically prohibit the introduction of intoxicants into Mellette County for twenty-five years just as if that county were Indian Country if it were not a part of the reservation?" (B.P. at 49) or as paraphrased in the text of the opinion: "The plaintiff would attach to this provision the Congressional intent to continue the lands in Mellette County as Indian lands." A.A.I at 67. In responding, the court below was impressed with the limited duration of the protection and concluded, correctly, that "Evidently Congress felt that is must provide a special section to prohibit such intoxicants for a period of time to protect the Indians who still had allotted lands in that area." A.A.I at 67.

This position was soundly supported by remarks in the debate on the provision wherein the court also found enlightening certain remarks in the Congressional Record stating that: "there is no longer a reservation when the lands are sold." 45 Cong. Rec. 5462, 5464.

The origin of the provision in the Mellette County Act can be traced to the Secretary of the Interior, R.A. Ballinger, who recommended that intoxicant provision in light of the then recent United States Supreme Court Case of *United States v. Dick*, 208 U.S. 340 (1908), which held prohibitions of this nature to be constitutional even though the land was to be ceded and restored the public domain. Specifically, Mr. Ballinger stated.

> The Supreme Court of the United States in Dick v. United States (208 U.S., 340), sustained a provision prohibiting the introduction of intoxicating liquors upon lands ceded by Indians for a period of twenty five years, but emphasized strongly the fact that the provision was for a limited period reasonable in duration. The Department doubts very much the advisability of attempting to impose upon ceded lands a perpetual prohibition against the sale of intoxicants, and also doubts the advisability of prescribing punishment for the sale of liquors in violation of the law. . . .Letter from R.A. Ballinger, Secretary of the Interior to Charles H. Burke, January 13, 1910.

Certainly this explanation should *not* have "led the court below to an opposite conclusion." B.A. at 33. Similarly, the citation of *Cohen*, by the court below which stated that "the purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians [i.e., the diminished reservation]" was chastised by the appellant has having "no rational basis." B.A. at 32 (21). Unfortunately for appellant, the very same United States Supreme Court decision cited by Secretary Ballinger as the reason for the inclusion of the provision in the 1910 Act was also cited by Felix Cohen as an example of one of the "extensions upheld" by the United States Supreme Court in a footnote to the very same paragraph cited by the court below. *Cohen* p. 353 footnote 26.

Also, appellant's paraphrasing of what the court below "erroneously assumed" or failed to correctly assume (B.A. at 32) would seem to your appellee to somewhat distort what was actually presented in the opinion of the court below. For example, the court below did not use the term "buffer area" in its entire opinion.

(e) Section 1: "On the Diminished Reservation."

In the court below, appellant devoted six full pages of its brief to an attempt to convince that court to either totally disregard, attribute a different meaning to, or subject the following phrase to some ambiguity rule.

> **Provided, That any Indians to whom allotments have been made on the tract to be *ceded* may, in case the elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservations*. . . .Act, *supra* (emphasis added).**

In this Court, appellant, while only devoting three pages of its brief to similar events goes one step further and actually asserts that "What the district court conceived to be evidence of an intent to dissolve the reservation status." B.A. at 29(emphasis added). This statement is as untenable as the assertion made in the court below that:

> *The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that portion of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed resolved in favor of the Indians in statutes passed for their benefit.* B.P. at 45 (emphasis as in original).

and the "to remain reservation Indians and receive the benefits of Government programs" argument which has already been discussed and disposed of at 16, 17, *supra*. . . irrespective of whether or not this would involve "so insensitive a result." B.A. at 28.

The remainder of appellant's alternative arguments will not withstand analysis either. For example, the statements in the *Mattz* opinion referring to the "was" in the Klamath River Reservation were intrinsically limited to the peculiar fact situation presented therein (the fact the reservation was considered to have been abandoned prior to the 1891 executive order) and as such are of no assistance whatsoever to appellant's "shorthand term of identification" argument. B.A. at 29.

Finally appellant urges that the "word 'diminished', as used in the 1910 Act must be delegated its place in the total context" and then sets forth a quotation from *Condon*. B.A. at 28. Earlier in its brief appellant had urged: "The reservation status of the Rosebud Reservation turns on the meaning and effect of those three statutes. But that meaning in effect takes life only in the *context of the history of the reservation.*" B.A. at 2 (emphasis added). The appellee would submit that in this instance, *this* remains a more appropriate place from which to ascertain the proper context and meaning of the word "diminished", indeed of the entire phrase in which it is contained. As far as the significance which appellant has anticipated appelleewould attach to this phrase, it has simply miscalculated. In the first place, appellee would never advocate that an issue of congressional intent be disposed of by either a "casual reading" of an act or the presence of an "isolated word." B.P. at 46. The whole of this brief has been constructed around the concept that if the acts are construed in their proper historical perspective and in light of all the probative evidence of congressional intent that is available a picture of a reservation diminished by a *series* of acts unfolds. After all, in appellant's words, "This action seeks declaratory judgment as to the *effect* of these acts, 1904, 1907, 1910, on the size of thereservation. In truth the action asks the court to define for the parties the present boundaries of the Rosebud Indian Reservation." A.P. at ix (emphasis added). Of course,

appellee deems significant the fact that the 1910 Act, on its face and in plain language referred to the tract as being "ceded" and the reservation as being "diminished." But it is when this phrase is viewed in conjunction with the other material, such as Congressman Burke's statement of April 27, 1910:

> Mr. BURKE of South Dakota. . . .I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, andhave those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, and *I believe that the placing through what were heretofore reservations* actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. . . .45 Cong. Rec. 5457 (1910) (emphasis added).

and House Reports No. 332, 429.

> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale therof, under the terms of the bill, will probably amount to $3,000,000. *There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of* . . . . . H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

that the "effect of the acts" on the Rosebud Reservation can best be realized. And this was the manner in which the court below treated the question presented:

> It is this Court's opinion after having examined all the contemporary legislative materials, various government reports and discussions that the whole context of the acts from 1904 through 1910 had but one purpose in mind. It is clear that the purpose of those acts was to open those reservations to non-Indian settlers and to civilize those areas in what the Congressman obviously regarded as an uncivilized portion of the United States. As each successive act was proposed in Congress various reports referred to a continuing diminished size of the Rosebud Reservation. Originally the reservation was said to comprise 3,000,000 acres and later 1,800,000 acres and to finally compromise the reservation roughly to the size of 1,000,000 acres. A.A.I at 74.

There are no less than forty separate and unequivocal references in the Rosebud documents attributing a similar meaning to diminished that can only be equated with reduction of the boundaries of the Rosebud Reservation, some of which have been set forth *supra*, and some of which remain to be discussed.

(f) Todd County.

> No legislation has been enacted providing for the opening of Meyers [Todd] County, South Dakota, and until provision has been made for such opening that county will

remain a part of the Rosebud Reservation. Letter of March 24, 1909, from Acting Commissioner of Indian Affairs to W.W. Rankin. Archives 16937-09, Rosebud 308.1.

The position of appellee has been throughout this entire brief that Congress intended that each county affected by each act would be necessarily removed from the Rosebud Reservation. In other words, only after provision had been made for each opening was the county thereby removed. In 1909, *referring specifically to the Rosebud Reservation*, the Acting Commissioner of Indian Affairs succinctly paraphrased your appellee's position: "No legislation has been enacted providing for the opening of Meyers [Todd] County, South Dakota, and until provision has been made for such opening that county will remain a part of the Rosebud Reservation." Letter, *supra*.

The legislation referred to by the Acting Commissioner *was* introduced a short time later and as a postscript to the detailed discussion of the legislative history of the three acts presented heretofore, appellee would urge this Court to consider the following documents and their bearing upon the opinion of the court below in the arguments presented in this brief.

On page 48 of appellant's brief there appears a summary reference to a 1911 bill providing for the opening of Todd County, similar in all respects to the bills that were enacted to dispose of the surplus land of the Rosebud Reservation. At the conclusion of this discussion, appellant states "On the theory of the court below, if the 1911 bill had become law, *there would be no Rosebud Indian reservation.*" B.A. at 49 (emphasis added). This is precisely the substance of what the Acting Commissioner referred to above and this is precisely the interpretation given the proposed legislation by Inspector McLaughlin, Senator Gamble, the Commissioner of Indian Affairs, the Acting Commissioner of Indian Affairs, and the Secretary of the Interior.

In May of 1911 Senator Gamble introduced a bill for the sale and disposition of the surplus lands of Todd County and requested the Secretary of the Interior to submit a report on the merits of the proposed legislation. In his letter to the Secretary, Senator Gamble stated:

> . . . .The area proposed to be opened compromises *all the remaining lands within the Rosebud Reservation*. Conditions are such on this reservation I believe it would be greatly to the advantage of the Indians should the lands be open to settlement. Railway extensions are in prospect in this part of the state. The opening of the lands would encourage and I believe make certain such extension. . . .The development of this part of the state has been greatly retarded in consequence so much of the lands being held *within* Indian reservations, and I regard it a matter of the utmost importance to the development and growth of the state that the lands be thrown open to settlement at the earliest practicable date consistent with the best interest of the Indians. I know of no substantial reasons why such conditions do not now exist. Letter from Senator Gamble to the Secretary of the Interior, April 12, 1911.

The Secretary, by letter of May 19, 1911, declined to do so, until Inspector McLaughlin could ascertain the wishes of the Indians.

On May 22, 1911, Inspector McLaughlin was instructed to proceed and complete his report by next December prior to the convening of Congress. As usual, the secretary noted that "Detailed instructions appear unnecessary in view of your several similar assignments in the past." A.A.III. doc. 36.

On November 1st Inspector McLaughlin convened the council at the Rosebud Agency. The members of the Rosebud Sioux Tribe were unanimously opposed to the proposition:

> RUBIN QUICK BEAR: . . .Everytime you come here we give you the land. . .Now we have a small reservation and we don't want to sell or dispose of it in any form.
> TODD SMITH: Whatever I say here about the proposition is all right and Senator Gamble will know it. Tell him that he wants to buy Todd County but Todd (Smith) won't sell it.
> LEWIS BORDEAUX: . . . .Before when you came for land I was always glad to help you because you are a friend of mine. *We have given you three good counties of land. And this last county we have, there is very good little land left in it, but a large lot of sand hills.* Therefore we want to preserve this land for ourselves and we pray you for this. The people are still increasing and we want to save this land for them. *We have given you three counties.*
> CLARENCE WHITE THUNDER: . . .The next time the Great Father sends his message to Congress tell him not to mention Todd County. *We will hold on to Todd County for 50 years.* A.A. III. doc. 37 at 3,5,8,9,11. (emphasis added).

Inspector McLaughlin's response incorporates the essence of the holding of the court below and appellee's position before this court:

> INSPECTOR McLAUGHLIN: . . .I fully appreciate your feelings on this matter, knowing that *your reservation*, which *was a very large one a few years ago, is now reduced to the limits of Todd County*, and I can understand very well how you feel; that you are very desirous and anxious to retain this county intact. A.A.III doc. 37 at 14,15 (emphasis added).

In his report submitted on November 3, 1911 to the Secretary of the Interior, Inspector McLaughlin reiterated that:

> . . .The Indians appealed very feelingly for the retention of the remaining small acreage of their surplus land for allotment to children born to them, and it is believed that all of the agricultural lands of the *diminished* Rosebud reservation would thus be exhausted in the next two years.
> *The diminished reservation of the Rosebud Indians is now embraced in Todd County, South Dakota.* . . .161,920.10 acres of surplus and unallotted lands within the *diminished* Rosebud reservation, . . .In the past eight years the Rosebud Indians have

consented to *the opening of fully three-fourths of their original reservation*, that is Gregory County in 1904, Tripp County in 1909, and Mellette County, recently appraised and registered for, an open to entry April 1st next. With the *diminished reservationof the Rosebud Indians being now only about one fourth of its area eight years ago*, . . .The Pine Ridge Indians having at present three-fourths of their original reservation intact, while the Rosebud Indians, whose reservation adjoins the Pine Ridge Indian reservation on the east, have had *their reservation diminished in the past eight years to one-fourth of its original area*. . .they having so commendably consented to each of the three cessions of their reservation in the past eight years,. . . A.A. III doc. 38 at 2-3, 4-5 (emphasis added).

He concluded by saying that because of the opposition the opening should be deferred for a year or two but nevertheless noted that "certain erroneous wording in the Senate bill was superfluous" and should be deleted:

> . . .Furthermore, the provision in the first Section of said bill, lines 10 to 14, page 2, is superflous, which reads: 'That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof onthe diminished reservation.'
>
> The said Senate Bill provides for the opening of all the surplus lands of the Rosebud Reservation and should the bill become a law there would be no *diminished Rosebud reservation*. A.A.III, doc. 38 at 5,6 (emphasis as in *original*).

Evidently Senator Gamble had used the old Mellette County bill as a prototype for S. 100 and Inspector McLaughlin noted the error. In his report of April 30, 1910, the Assistant Secretary of the Interior concurred in McLaughlin's analysis, noting that "If the bill becomes a law, it will provide for opening all of thelands now constituting the diminished Rosebud Reservation, and *there will, therefore, remain no further diminished reservation*." A.A.III, doc. 39 at 4 (emphasis added).

In addition to the other reference in this report to Todd County as the "diminished reservation" (i.e., within the diminished reservation . . .within their diminished reservation. . .lands within the diminished Rosebud reservation. . . within the diminished reservation. . .) there appears another even more persuasive and unequivocal account of the openings:

> For the information of your committee, however, it may be pointed out that by successive openings within the past few years *this reservation has been successively reduced to less than one-fourth of its original area*. Gregory County was opened in 1904 under the provisions of the act of April 23, 1904, (33 Stat. L. 254), Tripp County, in 1908, under the act of March 2, 1907, (34 Stat. L. 1230); and Mellette County will be opened during the present year under the act of May 30, 1910 (36 Stat. L. 448), the President's proclamation therefor having been issued on June 29, 1911.
>
> It may be said that upward of 7,000 Indians within this reservation have previously been allotted approximately 1,679,000 acres of land, of which 636,300 acres fall *within Todd County – the diminished reservation*. A.A.III, doc. 39 at 4.

On January 23, 1913, Senator Gamble submitted S. Rep. 1166 containing the following remarks, again indicating that Todd County was *the* Rosebud Reservation:

> In the opinion of your committee the surplus and unallotted lands are unnecessary for the use of the Indians and the opening of *the* reservation will result in a large increase in the settlement and development of that part of the State and will, to a very large extent, enhance the value of the holdings of the Indians. Your committee regards it as of the highest importance, not only to the Indians themselves but to the people of the State and to the General Government, that all the surplus and unallotted lands should be open to settlement at the earliest practical date. A.A.III, doc. 39 at 2.

Then on February 27, after the superfluous language had been deleted as Inspector McLaughlin had suggested, the bill passed the Senate. 49 Cong. Rec. 4211 (1913).

Immediately thereafter, President Woodrow Wilson, the Commissioner of Indian Affairs, and the Secretary of the Interior were bombarded with petitions from members of the Rosebud Sioux Tribe requesting them to take action and prevent the legislation from passing the House. The petition of March 26, 1913, from the Rosebud Agency contains the following enlightening remarks:

> Hon. Commissioner of Indian Affairs
> Washington, D. C.
>
> Dear Sir: –We, the undersigned Indians of Todd County, S. D. respectfully protest against the proposed opening of this County to settlement. We protest against opening of *our last remaining portion of our once large Reservation* for the following reasons:
>
> 1. *We have already been deprived of the Counties of Gregory, Tripp and Mellette within the last few years*. . .
>
> 4. We think that the great body of Indians interested should be consulted with and their wishes ascertained in regard to *parting with our last remnant of a Reservation*.
>
> Petition to Commissioner of Indian Affairs,
> March 26, 1913, (emphasis added).

Another petition to the Commissioner of Indian Affairs on March 24 stated ". . .*We have already, since the treaty of 1889, contributed to the Government, to be opened to settlers, and sold, four tracts of land*. . ."Petition to the Commissioner of Indian Affairs, March 24, 1913 (emphasis added). The petition addressed to the Secretary of the Interior contained similar remarks ". . .The very best farming land that was in the Rosebud Reservation we gave up when the Counties of Tripp and Gregory were opened to settlement." Petition to the Sec. of the Interior, April 19, 1913 (emphasis added).

Soon thereafter, the Secretary of the Interior contacted Senator Gamble and stated in view of the

> fact that the Indians are decidedly opposed to *opening the diminished reservation* at this time and that there will be but little desirable land to place on the market, should the bill become a law, I have the honor to recommend that no further action be had on the bill at this session of Congress. Letter from the Secretary of the Interior to Senator Gamble.

In the same letter it was reiterated that:

> . . .by successive openings within thepast few years their reservation has been reduced to less than one-fourth of its original area. . .*This leaves within the diminished reservation at this time the lands in Todd County only*. . . Letter, *supra*.

Evidently, someone, somewhere, put an effective halt to the legislation, and no legislation for the sale or cession of the Rosebud Reservation ever again received consideration by Congress.

In any event, appellee would submit that the above materials not only add considerable dimension to what the Congress, members of the Rosebud Sioux Tribe, and Department of the Interior, and the Office of Indian Affairs meant by the term "diminished Rosebud Reservation" in the early 1900's, but they also should serve to illustrate the precise "effect" the three acts presented herein had on the original boundaries of theRosebud Reservation.

III. THE DOCUMENTS AND STATUTES CONCERNED WITH MELLETTE COUNTY AFTER THE PASSAGE OF THE 1910 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN

In addition to all of the 1911-1913 materials immediately above, the 1910-1920 era is replete with similar evidence.

1. Report of Commissioner of Indian Affairs, 32 (1910):

> Department of the Interior
> Office of Indian Affairs
> Washington, November 1, 1910
>
> Sir: I have the honor to transmit herewith the Seventy-ninth Annual Report of the Office of Indian Affairs covering the period July 1, 1909, to June 30, 1910. . .
> Rosebud, S. D. . .*This reservation has been diminished previously by various acts of Congress*, and the act of May 30, 1910 (36 Stat., 448), authorizes the *disposal* of a part of this reservation lying within Mellette and Washabaugh counties. . .

> Respectfully,
>
> Robert G. Valentine
> Commissioner
> (emphasis added).

2. Act of March 3, 1919, 40 Stat. 1320:

> (a) *Be it enacted*, etc., That the Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetery Co., for cemetery purposes, for a price not less than the appraised value thereof, a 10-acre tract within the *former Rosebud Indian Reservation in Mellette County*, S. D. described as the northeast quarter of the southeast quarter of the northwest quarter of section 34, township 42 north, range 29 west, sixth principal meridian, or such part thereof as may be required: *Provided, however*, That the tract conveyed shall be described in terms of the legal survey, the consideration to be paid to the superintendent of the Rosebud Reservation, to be deposited in the Treasury of the United States to the credit of the Rosebud Indians (emphasis added).
>
> (b) S. Rep. No. 745, 65th Cong., 3rd Sess. 1-2 (1919).

H.R. 12082 was introduced for the purpose of selling 10 acres of land belonging to the Rosebud Sioux Tribe in Mellette County, South Dakota, to the White River Cemetery Company. Included in the report on the bill is a letter to Hon. Charles D. Carter, Chairman, Committee on Indian Affairs, House of Representatives, from Alexander T. Vogelsang, Acting Secretary of the Interior, June 7, 1918:

> My Dear Mr. Carter: I am in receipt of your letter of May 14, 1918, inclosing (sic) for report H.R. 12082, a bill authorizing the sale of certain lands in South Dakota for cemetery purposes, and in response thereto I have the honor to submit the following:
> The bill proposes to convey for cemetery purposes a 10 acre tract within the *former Rosebud Indian Reservation in Mellette County*, S. Dak., described as . . .Said land was opened to settlement and entry under the act of May 30, 1910 (36 Stat. 448) which provides that the proceeds of the sale of the lands in said *former Indian reservation* shall be deposited to the credit of the Indians thereof and that the disposal of the land by the United States shall be in trust for their benefit. . .(emphasis added).

Although the counties were not able to locate and compile the same amount of material for the 1910 confirmation section that was presented in the 1904 and 1907 sections, we did find two references of a later date that aptly summarized the total effect of the Rosebud legislation on the size of the Rosebud Reservation.[15] In 1940 Dr. Green described that effect as follows:

15. Part of the difficulty in locating material for this section was due to the fact that the counties were unable to obtain certain volumes which would have contained additional material on Mellette County. Specifically, the counties have in mind the Rosebud Agency Reports and Public Land Decisions. To a lesser degree, this was also true in the 1904 and 1907 confirmation sections. Also See Note 8, *supra*.

> The breakup of the Rosebud Reservation began in 1904. In that year Gregory County (about 416,000 acres) was ceded. In 1907 Tripp County, with an area about twice that of Gregory County, was transferred to the Government, and opened for settlement the following year. And on May 30, 1910, Congress confirmed an agreement for the cession of all surplus lands in Mellette and Washabaugh counties belonging to the Rosebud Sioux. These three cessions *lopped off approximately three-fourths of the original Rosebud Reservation and leaves, at the present time, only the area within Todd County as a closed reservation*. . .XX STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 34-35 (1940). The cited source contains the Doctoral dissertation of Charles Lowell Green entitled "The Administration of thePublic Domain in South Dakota" (emphasis added).

On May 28, 1959, the Assistant Secretary of the Interior, Roger Ernst, in a letter to E. Y. Berry, more succinctly stated:

> . . . The *boundaries* of the Rosebud Indian Reservation *were changed* to eliminate Mellette County, and to show the *diminished reservation as lying in Todd County*. This is shown on the map of South Dakota published by this Department in *1918*. There remained, however, within Mellette County Indian allotments which were effective and did not come within the cession and opening under the 1910 act. The ceded lands fall within not only Mellette County, but *the adjoining counties* within the *former* boundary of the original Rosebud Indian Reservation. Letter from Rober Ernst, Asst. Secretary of the Interior to E.Y. Berry, May 28, 1959 (emphasis added).

With respect to a summary statement at this point, there is very little the counties could add to Mr. Ernst's letter. [16]

PART TWO

I. THE SEYMOUR AND MATTZ DECISIONS

> There will still be left a reservation containing about 1,000,000 acres [Todd County], and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 429, 61st Cong. 2d Sess. 2 (1910).

In 1910 Congress dictated that this was all that would remain of the original Rosebud Reservation, and for over 60 years Todd County has been considered to be *the* Rosebud Reservation. It is the position of appellee that neither *Seymour v. Superintendent*, 368 U.S. 351 (1962), nor the other recent decisions constitute a mandate to this Court that it must disregard the intent of Congress as evidenced by the passage of these three acts. The *Seymour* case did *not* hold

16. The 1918 map referred to in Mr. Ernst's letter, in addition to others, will be presented to the court.

that all acts similar to the one construed therin were not intended by Congress to diminish reservations. On the contrary, Justice Black specifically stated that:

> In *United States v. Celestine*, this Court said that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." We are *unable* to find where *Congress* has taken away from the Colville Indians any part of the land within the boundaries of the area which *has been* recognized as their reservation since 1892. 368 U.S. at 359 (emphasis added).

Implicit in the second sentence, is a situation which certainly does not describe the Rosebud materials, for not only was the Supreme Court in *Seymour* unable to find evidence of congressional intent to take away from the Colville Indians any part of the land within the boundaries of the 1892 Colville Reservation, but what evidence they did find indicated that Congress consistently continued to recognize the reservation boundaries as established by the 1892 act. [17]

This is simply not thecase with the Rosebud materials and even the appellant in *Seymour* recognized the importance of such a distinction when at 11 in its brief he stated ". . .*there is no provision or legislative history relating to the Colville Act* which shows that Congress intended to change the Colville boundaries *as it did the boundaries of the South Dakota reservations*." B.A. at 11. *Seymour v. Superintendent*, 368 U.S. 351 (1962) (emphasis added).

Nothing in the *Seymour* opinion can be construed in such a manner to indicate that the United States Supreme Court did not or would not continue to recognize this distinction. Indeed, the counties would submit that it was for this very reason that the opinion continually referred to only the situation that the court found to exist in the Colville materials. In addition, there is not so much as even a footnote casting doubt upon what was then the highly regarded line of cases from the Eighth Circuit and the State of South Dakota. As a matter of fact, the only reference to any case concerned with a South Dakota reservation in the entire opinion is in footnote 19, wherein Justice Black cites *with approval* the Eighth Circuit case of *United States v. Frank Black Spotted Horse*, 282 F. 349 (8th Cir. 1922). In *Spotted Horse* the Federal District Court of South Dakota held that Todd County "*in the absence of an act of Congress opening that country to settlement, and disintegrating thereservation, remarking and changing the reservation boundaries, marking the changes, or abolishing it entirely*" (282 F. at 352 [emphasis added]), was still the Rosebud

17. "That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half or diminished Colville Indian Reservation." 368 U.S. at 356.

Reservation and all land within it was subject to the jurisdiction of the United States.

Although Justice Black undoubtedly cited the case only for a specific reason,[18] the tenor of the whole decision was that under the then *established law*,[19] Todd County was *the* Rosebud Indian Reservation. Gregory, Tripp, Lyman and Mellette County are not even mentioned in the *Frank Black Spotted Horse* decision.

It would seem to the counties that *Frank Black Spotted Horse* would be a questionable case at best to cite with approval, if the Supreme Court intended *Seymour* to be construed in such a manner as to virtually destroy the 30 years of South Dakota reservation case law in the Eighth Circuit.

In any event, for the Court to hold in *Seymour* that the Colville Act was not inconsistent with the continued existence of the reservation boundaries is one thing. The statement appearing in appellant's brief below at 18 is quite another:

> The Court's decision, presumably made with the above historical circumstances in mind, was that the Colville Act, in opening the surplus and unallotted land on that reservation to non-Indian settlers, did not *expressly* disestablish or diminish the Colville Reservation, and that, because it had not do[sic] so *expressly*, it had not done so at all. B.P. at 18 (emphasis as in original).

Not even the recent decisions have gone so far as tocite *Seymour* for this proposition, let alone state it as the "decision" of the court. Appellee notes that although the *Seymour* opinion did use the word "expressly" in two instances, the first was not even related to plaintiff's statement:

> This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the Government for their" (the Colville Indians') use and occupancy." 368 U.S. at 354.

In the second, Justice Black was merely noting the difference between the 1906 and 1892 Act when he stated:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain. 368 U.S. at 355.

Had Justice Black thought it necessary to state the holding in a manner even approaching the force of appellant's statement, he was certainly capable of doing so. In any event, in *Mattz v. Arnett*, *supra*, the United States Supreme Court disposed of this phase of appellant's argument by succinctly stating that "A congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history" and was as the case in *Seymour*, nothing else in the *Mattz* opinion can be fairly said to constitute a mandate to this Court that it must disregard what is clear from the surrounding circumstances and legislative history of the three Rosebud acts. 412 U.S. at 481 (1973) (emphasis added). In this respect, as in all others, the findings of and the material considered by the court below indicating that the:

> . . .Surrounding legislative history and the circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or 'Indian land' nature of those counties thereafter.

from the Rosebud Reservation is wholly consistent with the standards set forth in *Mattz*. A.A.I at 74-75(emphasis as in original).

In addition the whole of the *Mattz* opinion is so intrinsically involved with the peculiar fact situation preceding the 1892 act construed therein that the general statements such as " 'The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was terminated' " which appellant has extracted to indicate a consistency between the allotment provisions in the 1892 Act and the Rosebud Act and to discredit the analysis of the court below are of no provative value whatsoever. B.A. at 23. This is especially so in light of the additional fact that appellant's attempt to discredit the analysis of the court below is founded upon a misreading of the fact situation in *Mattz*. Appellant's statement that "Prior to the 1892 Act in *Mattz* there had been no recognized reservation" simply doesn't square with Justice Blackmun's reognition that "Just a few weeks before the bill (H.R. 38, 52d Cong. 1st Sess.), which eventually became the Act, was reported out of committee on February 5, 1892, H.R. Rep. No. 161 52nd Cong., 1st Sess., the President had formerly extended the Hoopa Valley Reservation to include the Klamath River Reservation." B.A. at 24. 412 U.S. 481 (1973).

The appellee finds the *Mattz* opinion very important in one other respect which has not been mentioned to date in the most recent opinions: the two citations, with approval to the 1916 United

18. The Frank Black Spotted Horse opinion rejected the "checkerboard" concept of criminal jurisdiction within Todd County.

19. *United States v. LaPlant*, 200 F.92 (D.S.D. 1911).

States Supreme Court case of *United States v. Nice*, 241 U.S. 591 (1916). In *Nice*, the Court was presented with another case in which the status of a member of the Rosebud Sioux Tribe was involved--only this time it was an allottee "in Tripp County, South Dakota" (241 U.S. at 591). As was the case in *Frank Black Spotted Horse, supra*, one cannot read the *Nice* decision without concluding that the court was concerned with the status of an allottee *outside* of the boundary of the Rosebud Reservation, who was involved in a sale of an intoxicating beverage.

Early in the opinion the court states that "the sale was made August 9, 1914, *in Tripp County, South Dakota*" and that the allotment to this Indian was . . made from the tribal lands in the Rosebud Reservation, in South Dakota, under the Act of March 2, 1889. . ." 241 U.S. at 591 (emphasis added). Nowhere in the opinion does it even imply that Tripp County was still in the Rosebud Reservation. To the contrary, the court addresses itself to the question, prefacing its discussion on the merits with:

> The power of Congress to regulate or prohibit traffic in intoxicating liquor with small tribal Indians within a state, *whether upon or off an Indian reservation*, is well settled. It has long been exercised, and has repeatedly been sustained by this court

and cites cases specifically dealing with the status of an allotment and an allottee, who were then outside the boundaries of a reservation. 241 U.S. at 591 (emphasis added). *See, United States v. Pelican*, cited in Footnote 1.

Although Justice Blackmun, as Justice Black did in *Seymour* with *Frank Black Spotted Horse*, undoubtedly cited the case only for a specific reason, one fact remains the same: In 1916 Todd County was the Rosebud Reservation under the then established case law and the United States Supreme Court in *Nice* impliedly recognized it as such.

In addition appellee would merely note that if the United States Supreme Court had intended *Mattz* to effectively decide all cases in which a portion of a reservation was "opened" to homesteading, the court would not have called attention to the fact that an opening of a reservation could terminate or disestablish that reservation ("It is clear from the text, *infra*, that there were efforts in certain quarters of the House *to terminate the reservation and open it for white settlement*") and most certainly would not have set forth the most significant, if not the only general guide-line for construction in the whole decision: "a congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." 412 U.S. 481 (1973) (emphasis added). Under this standard, the specific

documents presented herein should be just as persuasive today as they would have been before *Mattz* was decided.

II. THE RECENT DECISIONS

In its brief to the court below appellee stressed the very unique attributes that the Rosebud documents possess for assisting any court in resolving an issue similar to the one presented herein. Primarily, appellee's position was founded upon the belief that:

1. Because the Rosebud Reservation was the first reservation to which Congress applied its new policy in the specific form of the 1904 Act, the legislative and historical materials were more detailed than the materials surrounding the later acts.

2. Because the Rosebud Reservation was the target of three separate acts, and these separate acts were all the subject of one declaratory judgment action, the court would have the unique opportunity of viewing the acts both retrospectively and prospectively.

Basically, appellee's position remains the same before this Court. However, in the court below we also noted that since the other courts recently construing similar acts had not shared this position, too much reliance had been placed upon the *holding* of *Seymour, supra*, and so we preceeded to analyze in detail the arguments presented to and accepted by those courts. Because the *Condon* and *Feather* opinions of this Court do not indicate a further reliance upon the arguments presented below however, this phase of the brief below will not be presented to this Court.

By way of an analysis of the *Condon* and *Erickson* opinions, appellee will stand primarily upon the two unique attributes it believes the Rosebud materials to possess to aid this court in resolving the effect the *Rosebud Acts had upon the Rosebud Reservation*. In *Condon*, this Court noted that it was "admittedly a close question" and that a "resort to the applicable contemporaneous and subsequent legislative history" was "not helpful," and further that "each case, of course must be decided under the applicable statute and upon its own facts." 478 F.2d at 687, 688, 689.

Appellee would submit: that the Rosebud Reservation is a separate case to be decided under the applicable statute and upon its own facts; that resort to the applicable contemporaneous and subsequent legislative history of the Rosebud Reservation is helpful; and that, in fact, a reading of the Acts, their legislative history, and subsequent congressional treatment does require the opposite conclusion in this case. Since the question is not close a holding "favoring Federal jurisdiction is" *not* required. 478 F.2d at 685, 686, 687, 688, 689.

In *Feather, supra*, this Court reiterated: that "nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of Congress regarding the reservation boundaries"; that the "later congressional enactments" were not even "admittedly inconsistent and confusing"; and that it was "noteworthy that the South Dakota Supreme Court, while interpreting an Act similar to the Act in issue here, has recognized the principles established in *Seymour* and *New Town* and denied state jurisdiction in an analogous situation. *State v. Molash*, 199 N.W. 2d 591 (1972)."

The appellee would submit: that the Rosebud Documents are replete with probative evidence that can be gleaned from the legislative history and subsequent legislative enactments; that this material can certainly be fairly said to shed further light upon the intent of Congress regarding the Rosebud Reservation boundaries; and that the body of legislative documents concerning the Rosebud Reservation does, against the glare of *Seymour* and the more recent judicial guidance in *Mattz, Condon* and *New Town*, nevertheless demonstrate something more than mere "congressional inattention to disestablish the" Rosebud Reservation. The South Dakota Supreme Court would not ascribe its "noteworthy" *holding* in *Molash* to the Rosebud Reservation in light of this or similar legislative history. *Cook v. State of South Dakota*, No. 11326-2-FGD (S.D., filed Mar. 13, 1974).

III. THE RECENT DECISIONS AND THE "PREPOSITION" ARGUMENTS [20]

Although arguments of this nature have been relied upon less and less in the more recent opinions, there still continues to be some importance attached to certain prepositions describing the location of certain land as within, in, or on the reservation. For example, while the *Condon* opinion omits all reference to this aspect of the arguments, the preposition argument surfaces again, albeit briefly in the *Feather* opinion:

> "President Harrison in his Proclamation opening the lands 'within the Lake Traverse Reservation' to settlement (emphasis supplied) 27 Stat. 1017. This reference is by no means conclusive. 489 F.2d 99 (1973).

In the court below, appellant relied extensively on this argument and to fully appreciate the extent of this reliance, one need only refer to those sections of its brief wherein this argument was used not only to support the statement that "the three acts repeatedly refer to the Rosebud

20. The introduction to this argument and its inapplicability to the Gregory County materials is discussed at 5, *supra*. The material therein should be read in conjunction with the material set forth in this section.

Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist *as such*" but also to support the proposition that "at least two presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24, 44, 45 (emphasis as in original).

In appellant's brief to this Court, most of this argument has been abandoned, although a portion is retained in appellant's attempt to render the very persuasive subsequent congressional enactments and other materials presented in this brief "inconsistent, inconclusive and for that reason not a reliable indicator of congressional intent." B.A. at 59. Although appellee definitely does not think that one citation and appellant's "Indian oriented statute" argument even approaches rendering the Rosebud documents "inconsistent," some comment would nevertheless appear necessary. Appellee will discuss the different phases of this preposition argument under the following subheadings:

A. THE ACTS

This phase of the preposition argument has its genesis in footnote 11 of the *Seymour* opinion wherein four sections of the Colville Act were cited for the proposition that the Colville Act repeatedly referred to the Colville Reservation "in a manner" that indicated that Congress intended that the Colville Reservation continue to exist as such. 368 U.S. at 355. Justice Black did not specifically refer to any phrase within these sections nor did the opinion explain what was meant by "in a manner." Appellant in the court below had presumed that the court was referring to phrases within those sections such as "on said reservation" and therefore extracted similar phrases from each and every section of the three acts. Although your appellee could not determine precisely what Justice Black meant, perhaps he thought the sections in some way referred to the continuing existence of a reservation which the state was maintaining would no longer exist at all.

In any event, appellee failed to see how the references cited by appellant below supported the proposition that "the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist *as such*." B.P. at 45 (emphasis as in original). For example, it cited "of the said Rosebud Reservation" from Section 2 of the Mellette County Act. B.P. at 44. That section states in part:

> Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed. . . Act, *supra*, Section 2.

The appellee would submit that this, or any other reference to the continuing existence of the Rosebud Reservation in the three acts, is *not* probative of the issue to be decided in this case for the simple reason that appellee is not, as was the case in *Seymour*, maintaining that the entire reservation would cease to exist.

Not one word of explanation of appellant's rationale below appears in its brief other than: "Therefore, since the United States Supreme Court cites the above language of the Seymour Act in support of the proposition that. . .then the nearly identical language in the three acts *must* support with equal force that . . . ." B.P. at 45 (emphasis added). Why? Unless the mere fact that theColville Act contains the phrase "of the said reservation" and the Mellette County Act also contains the phrase "of the said reservation" is supposed to be probative of *something*, appellee sincerely fails to see how this in any way supports the proposition that the acts "repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist *as such*." B.P. at 45 (emphasis as in original).[21]

Evidently the courts in the recent cases of *New Town*, *Molash*, *Condon*, *Mattz* and *Feather* have not considered similar phrases appearing in those acts probative of the diminution issue either. None of the opinions even mentions them.

B. THE PROCLAMATIONS

Nor could appellee agree that the Presidential Proclamations indicate "at least two Presidents have interpreted the *three* acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added).

1. 1904 Proclamation–Although appellant below actually conceded that from the language therein "one might infer that Roosevelt did contemplate a diminished Rosebud Reservation" (B.P. at 25), its statement remained "two presidents have interpreted the *three* acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added). How appellant eventually arrived back at the *three* act figure was illustrative of the rather tenuous nature of many of appellant's arguments below. In essence it stated: that Roosevelt nearly duplicated the language Congress used inthe 1904 Act; that the 1904 Act is ambiguous and is subject to its "ambiguity" rule; and that therefore President Roosevelt's 1904 Proclamation should be equally subject to this

21. The Gregory County Act prepositions do not even have this dubious distinction for they, as stated at 31, *supra*, are all from Article IV of the 1904 Act, which is *the* Article IV of the original 1901 lump-sum cession agreement.

rule. Hence, from *two* acts back to *three* acts! B.P. at 25. Your appellee would submit that the use of this type of analysis to support a statement that the 1904 Proclamation indicates President Roosevelt interpreted the 1904 Act not to have diminished the Rosebud Reservation is, at best, questionable.

2. 1907 Proclamation–The only support for appellant's statement below in this instance was the "of" in the first paragraph of the 1907 Proclamation:

> Whereas by the Act approved March 2, 1907 (34 Stat., 1230), the Congress directed that all that part *of* the Rosebud Indian Reservation lying south of the Big White river, and east of Range 25 west, of the Sixth Principal Meridian, except all Sections 16 and 36, which were granted to the state of South Dakota, and excepting also such parts thereof as have been or shall hereafter be either allotted to Indians, selected by said state, or reserved for townsite purposes, be disposed of under the general provisions of the homestead laws of the United States, and be opened to settlement, entry and occupation only in such manner as the President might prescribe by proclamation;
>
> Now, therfore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority vested in me by said Act of Congress, do hereby prescribe, proclaim and make known. . . .Act of August 24, 1908, 35 Stat. 2203 (emphasis added).

In the first place, appellee would submit that a singular unexplained "of" hardly supports an unequivocal statement that the Proclamation indicated that President Roosevelt *interpreted* the 1907 Act not to have diminished the Rosebud Reservation–and this "of" is not even of that status (i.e. unexplained). The source of the "of", as well as most of the entire paragraph, *is exactly where* appellant in the court below surmised President Roosevelt extracted his bad 1904 Proclamation language from: *the act itself*.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby authorized and directed, as hereinafter provided, to sell or dispose of all that portion *of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians*
> Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for theuse of the common schools andpaid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.
>
> Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President. . . Act of March 2, 1907, 34 Stat. 1230 (emphasis added).

Until appellee noticed appellant's explanation of the source of the phraseology in the 1904 Proclamation, they were admittedly somewhat concerned, not so much with the 1907

Proclamation,[22] as with the 1910 Proclamation. The explanation that the acts, referring to land to be disposed of as "'within" or "a part of" the Rosebud Reservation, were the source of the phraseology appearing in the Proclamations, was indeed welcome.

3. 1910 Proclamation—Again, the only support for appellant's statement below was a singular preposition, in this instance "within", appearing in the 1910 Proclamation:

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat. 440), and May 30, 1910 (36 Stat. 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands *within* the Pine Ridge and Rosebud Reservations in the State of South Dakota, which have been classified under said Acts of Congress into agricultural land of the first class, agricultural land of the second class, and grazing land shall be disposed of under the general provisions of the homestead laws of the United States and of said Acts of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise: . . .Act of June 29, 1911, 37 Stat. 1691. . . (emphasis added).

As in the 1907 Act, appellee would submit that this singular "within" hardly supports an unequivocal statement that the Proclamation indicated President Roosevelt *interpreted* the 1907 Act not to have diminished the Rosebud Reservation. Although the precise source of the "within" cannot be fixed as conclusively as was the "of" in the 1907 Proclamation, perhaps because of the dual nature of this particular proclamation, the 1910 Act does contain a number of "withins".

In any event, this whole process of building upon a singular preposition in a proclamation to support the statement that the proclamation indicated that the President *interpreted* the act not to have diminished the reservation; and from there to the main title that "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation," was illustrative of the quantity and quality of the material upon which appellant relied below.

The only other material appellant could muster below to support this statement was (1) the mere fact that in 1934 the Secretary of the Interior approved the Tribes constitution—*"The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation"* (B.P. at 24, 25) and (2) that in 1972 the Field Solicitor of the Bureau of Indian Affairs, Aberdeen, South Dakota, issued a memorandum consonant with appellants views (B.P. at

22. The relation between the "preposition" argument and the "open" terminology is discussed at 72 *infra*

26, 27). Hence, "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation" (B.P. at 24). In its brief to this Court, appellant has cited the same identical material for the propositions that *"1. The Secretary of the Interior treated the Rosebud reservation as embracing the territory delimited in the 1889 Act."* and *"2. The Secretary of the Interior approved the tribal Constitution defining the reservation as originally established."* B.A. at 54 (emphasis as in original). Appellee would submit that these are not exactly the type of administrative interpretations that are entitled to great weight, in this case where a portion of the reservation did continue to exist, to say the least. The Department of the Interior's position in this respect is made quite clear in the documents written before and immediately after the passage of the three acts.

C. THE LATER MATERIALS

But for the reliance upon this "preposition" argument, appellee would not have indulged in picking these materials apart in an attempt to explain each and every preposition. Indeed, if it had to rely solely on this process and thereby necessarily disregard the tenor of the whole transaction, appellee would eventually come to a situation like that on page 1853 of the Congressional Record where the following title and remarks appear:

> Extension of time to Homestead Settlers *on Rosebud Reservation S. Dak., etc.*
>
> Mr. MARSHALL. Mr. Speaker, I ask unanimous consent for the present consideration of the bill which I send to the desk.
> The SPEAKER. The gentleman asks unanimous consent for the present consideration of the bill the title of which the Clerk will report.
>
> The Clerk read as follows:
>
> A bill (s. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were *heretofore* a part of the Rosebud Indian Reservation with the limits of Gregory County, S. Dak.
>
> . . .
>
> Mr. UNDERWOOD. Mr. Speaker, reserving the right to object, I would like to ask the gentleman as to whether this bill increases the size of the homestead?
> Mr. MARSHALL. No, sir; it does not. This bill simply gives to the settlers *on* the. . .Rosebud Reservations, which were opened by proclamation last fall, an extension of time of about sixty days, until May 1, to move on their lands and make improvements.
> Mr. UNDERWOOD. It does not increase the size of the homestead?
> Mr. MARSHALL. Not the slightest. . . 39 Cong. Rec. 1853 (1905) (emphasis added).

Your appellee would then be at a loss for an exact explanation as such for Congressman

Marshall's indiscriminate use of the preposition "on" and hence doomed to defeat. However, in light of the plain language of *this* statute, the House Report, the Senate Report, the title and remarks of Senator Gamble in the Congressional Record, and the information in the Interior documents,[23] appellee would *still* submit that, *in its entirety*, the judiciary could not expect a more relevant, consistent, clear, immediate, and unequivocal congressional confirmation that the 1905 "extension" statute and peripheral materials concerned therewith.[24]

The counties would also submit, that to view such prepositions in any other manner, and then either raise them to the status of an ambiguity and resolve the entire issue contrary to appellee's position, *or even worse*, consider such prepositions as evidence of a congressional intent present in 1904 *not* to diminish the reservation, would be to completely nullify that effect which Congress considered an almost obvious corollary of the act itself.

The final aspect of the preposition argument remaining to be discussed is its use in conjunction with "opened" reservation terminology. At *supra*, appellee has already discussed the fallacious nature of the mystical equation of this terminology with the trustee-homestead provision which supposedly "opened"a reservation without diminishing the size or boundary of that reservation. The combination of the two are illustrated in the following hypothetical 1905 statute:

> Chap. 178. An Act for the sale of isolated tracts in the *former* Rosebud Reservation.
>
> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the provisions of Section 1000 of the Revised Statutes of the United States as amended by the Act of May 31, 1904, relating to the sale at public auction of isolated tracts of the public domain, be, and the same are hereby extended and made applicable to lands *within* the portion of the Rosebud Indian Reservation, South Dakota, *opened* under the Act of April 23, 1904. . (emphasis added).

It is to be noted that the last part of the statute does not say "to lands [now] within the portion of the Rosebud Indian Reservation, South Dakota, *opened* under the Act of April 23, 1904" *nor* does

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23. These materials are set forth at , *supra*.

24. The counties would call to the Court's attention the manner in which the subheadings in the Congressional Record correspond to the remarks of the Senators and Representatives. In this instance, Marshall refers to settlers *on* the Rosebud and the subheading in the Congressional Record refers to settlers *on* the Rosebud. Senator Gamble, however, more explicitly refers to the extension of time which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation and the title in the Congressional Record merely states "Extension of time to Homestead Settlers." See 30, *supra*.

ay "to lands [formerly] within the portion of the Rosebud Indian Reservation, South Dakota, *ened* under the Act of April 23, 1904." In fact appellee would submit that the sentence is merely tatement of the issue to be decided, i.e. whether the lands within the portion of the reservation, ened under the Act of April 23, 1904, are now within the reservation. In this context the ithin" is meaningless and to equate "opened" with either diminished or non-diminished would be lassical example of begging the question.

The Rosebud hypothetical is included in this brief only to point out how the preposition ument in combination with the "opened" terminology, could lead one to find inconsistencies ere none exist and thereby disregard whatever probative value a later statute referring to a ormer" reservation might have.

As to the later statutes which are truly inconsistent within themselves or, for that matter, any er reference where the lands in question are still being referred to as "within" or "on" or "in" the ervation, your appellee would submit that this could be either a *direct result of the titles and tions of theoriginal acts themselves, referring to the lands in this manner* or as was the case in *ttz*, merely a "natural, convenient, and shorthand way of identifying the land subject" to the . 412 U.S. 481 (1973). For example, the 1907 Act entitled "Act to open to settlement surplus unallotted lands *in* the Rosebud Indian Reservation" (emphasis added) or the 1910 Act entitled ct to authorize the sale and disposition of a portion of the surplus and unallotted lands *in* llette and Washabaugh counties *in* the Rosebud Indian Reservation." The other prepositions are ttered at random throughout the entire text of the three acts.

For any person drafting legislation or commenting upon the original act to refer to the phrases earing in the original act or to use this shorthand term of identification, would certainly seem to just as plausible as the alternative: that the entire Congress and just about everybody else ncerned was so incompetent that they could not refer to a piece of legislation or draft a o-sentence bill concerned therewith without the same being either "internally inconsistent" or onsistent with other similar legislation or remarks they had made the previous day.

THE STATUS OF THE OPENED ROSEBUD LANDS

There are two related aspects of appellant's position on this issue which merit some extended cussion.

A. INDIAN TITLE

Using the somewhat questionable phrase "Indian title" to describe a beneficial interest which it maintained the Indians retained in the opened lands until they were disposed of, in the court below appellant stated that "Surely the prospect of lingering Indian title is incompatible with the notion of a diminished reservation." B.P. at 40. Along these same lines at 47 it reiterated:

> These surplus lands and unallotted lands in Mellette County did not become part of the public domain because the Rosebud Sioux retained an equitable interest in those lands until and unless the entryman perfected his entry. B.P. at 47.

In this Court appellant has raised similar arguments throughout its entire brief. [25] The case of *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), and other cited by appellant below and in this Court that "made this distinction clear" (B.P. at 47) were not concerned with the Rosebud Reservation or even the issue with which this Court is presented. The cases have not been cited in or relied upon by either *Seymour* or the recent decisions. Nevertheless, appellant still maintains the Rosebud Sioux retained an equitable interest in these *opened* lands.

It is appellee's position that *Congress* intended the three acts to extinguish all "Indian title" to the extent that the primary interest that remained was the right, as provided in the act, to the proceeds as the lands were disposed of. The 1912 Report of the Commissioner of Indian Affairs not only conclusively supports this position, but also reveals the *source* of some of the confusion in this particular area:

> Under various acts passed by Congress within recent years certain lands ceded by the Indians to the United States are open to settlement and entry, and the Government endeavors to dispose of them at their appraised value for the benefit of the Indians.
>
> Nearly all of such acts contain a clause practically identical with the following:
>
> > That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described, * * *or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.
>
> It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the *Indians' title thereto extinguished*. On this theory the public at large has come to consider *said lands a part of the public domain*, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such lands is not extinguished until date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale, or entry. Report of the Commissioner of Indian Affairs, 51 (1912).

As the report indicated, until *1912* it had been the practice to consider the Indians' title extinguished from the date the act was passed. In this respect the lands were considered a part of the public domain and therefore under the jurisdiction and supervision of the General Land Office. By departmental decision of November 27, 1911, however, the *department, not* Congress, decided to affect a procedural change in order to compensate the Indians for the use of the lands pending date of settlement, sale or entry.

In the first place, it should be noted that the effect of the three acts on the status of the land (the extinguishment of Indian title) remained unaffected by this departmental policy, as the acts themselves were in essence the final word from *Congress* on this point. Also, an examination of the Rosebud materials presented elsewhere in this brief shows that time and time again, the members of Congress, the Department of the Interior, and the Commissioner of Indian Affairs, all attributed this extinguishing effect to the three Rosebud acts.

Secondly, the prospect of a lingering "Indian title" of the nature referred to in the above report, and which lasted *only* until the lands were disposed of, would *not* necessarily be inconsistent with the notion of diminished reservation.

Similarly, throughout appellant's brief below and in this Court various other indirect and direct references are made to the concept of public domain. These and other similar references could lead one to think that the only manner in which Congress was capable of disestablishing any portion of a reservation was by the process of *technically* restoring the lands therein to the public domain with the specific use of the public domain terminology necessarily appearing on the face of the act as "words of art." Although the Rosebud materials do contain many references to the three acts restoring the open lands to the public domain, appellee does not necessarily agree that this is the *only* manner in which Congress could extinguish or diminish a reservation.

Specifically, your appellee has in mind and deems significant a statement by Judge Blackmun, now Justice Blackmun of the United States Supreme Court, appearing in the opinion of *Beardslee v. United States*, 387 F.2d 280 (C.A.8, 1967), [26] a decision of this Court made *after* the *Seymour*

25. One aspect of the argument was discussed at 9, *supra*.

26. Discussed at 77, *supra*.

decision. Justice Blackmun therein referred to the absence of Federal jurisdiction on non-Indian land "on a disestablished portion of the reservation, *however that disestablishment may have been affected.*" 387 F.2d at 286 (emphasis added).

In other words it is appellee's position that merely because some of the earlier cessions referred to a restoration of lands to the public domain and such cessions have since been held to have extinguished or diminished reservations, it should not be automatically assumed that unless a specific act or the legislative history thereof indicated an intent to technically restore lands to the public domain and these words appeared on the fact of the act, there could be no intent to extinguish or diminish that reservation. In fact, some of the earlier cessions which this Court has indirectly held to have extinguished portions of reservations would not conform to this standard. For example, the 1891 Fort Berthold Act.

V. INDIAN COUNTRY: 18 U.S.C. Section 1151

Many of the older decisions of the Eighth Circuit have been highly regarded in the field of Indian Law. This esteem has not only been recognized by judicial bodies in other states and the United States Supreme Court, but also by Congress. With specific reference to the effect of the homestead acts on the size of reservations in South Dakota, the case of *United States v. LaPlant*, 200 F. 92 (D.S.D. 1911), wherein Judge Willard stated that "No other meaning can be given to the words italicized ["thus diminished"] than that the reservations were diminished, and they were diminished by the act itself" (200 F. at 94), has been the cornerstone of this area of the law in this state for many years. Although the *LaPlant* case itself never achieved national prominence it was cited with approval in other cases that definately did. One such example was when the Eighth Circuit Court of Appeals decided *Kills Plenty v. United States*, 133 F.2d 292 (C.A.8 1943):

> In 1911, it was ruled in the case of *United States v. LaPlant*, D.C.S.D., 200 F. 92, that the federal court was without jurisdiction of the crime of murder committed on lands which were originally within the boundaries of the Cheyenne River Indian reservation but were excluded from the reservation by the Act of May 29, 1908, Chap. 218, 35 Stat. 460, diminishing the reservation. 133 F.2d at 294.

The question in *Kills Plenty* was essentially the same question presented in *Frank Black Spotted Horse*, *supra*, and it was resolved in the same manner. Although both cases were concerned only with checkerboard jurisdiction in Todd County, neither case even mentioned Gregory, Tripp, Lyman or Mellette County. Indeed, no one could have read *Kills Plenty* without concluding that Todd County was the only county considered to be within the boundaries of the Rosebud Indian Reservation at that time. Certiorari was later denied and when 18 U.S.C. 1151 was revised in 1948, *Kills Plenty* was cited therein as one of *the* cases on which the 1151(a) definition of Indian Country was based. Revisor's note preceding 18 U.S.C. Section 1151(1949). See also H.R. Rep. No. 304, 80th Cong. 1st Sess. A. 92 (1947). Therefore, at the time Congress defined Indian Country as "all land within the limits of any Indian reservation" (1151[a]) and based that definition in part on the *Kills Plenty* case, at least the revisors realized that Todd County was the only county considered to be within the Rosebud Indian Reservation. By enacting 1151(a) and to this extent, Congress *had* eliminated the impractical pattern of checkerboard jurisdiction in the only area of the Rosebud Indian Reservation they thought existed? [27]

But even in 1948, Congress realized that 1151(a) would not encompass all Indian allotments and so 1151(c) was set forth as an addition to the definition of Indian Country:

> All Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same. 18 U.S.C. Section 1151(c) (1949).

Appellee would submit, and as recently as 1967 this Court has so indicated, that *this is the only section of 18 U.S.C. 1151 that has been or was intended to apply to Gregory, Tripp, Lyman and Mellette counties. Beardslee v. United States*, 387 F.2d 280(C.A.8 1967).

Beardslee involved essentially the same issue that had been presented in *Kills Plenty* and *Frank Black Spotted Horse* and the same result followed. In two other respects, however, the case is very interesting. In the first place, it was decided *after* the Seymour decision and specifically mentioned Gregory, Tripp, Lyman and Mellette counties in a manner inconsistent with plaintiff's position:

> 1. The Rosebud Reservation was established by, and is described in, Section 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, Section 12.0102 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the *territory* of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion has remained closed since 1889. *The general geographical situation is thus clear.* 387 F.2d at 285 (emphasis added).

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27. Other sections of the Revisor's note and H.R. Rep. No. 304, *supra*, also indicate that the men responsible for drafting Section 1151-1154 were very much aware of that were then the reservations in South Dakota. One can only imagine how these men, *after reading Kills Plenty* would have enacted had some Court in 1950, held that Gregory, Tripp, Lyman and Mellette counties were suddenly within the limits of the Rosebud Indian Reservation.

More importantly, the opinion referred to "a disestablished portion of the reservation, however that disestablishment may have been effected" (387 F.2d at 286), and specifically stated that:

> We regard clause (c) as applying to allotted Indian lands in territory *now open* and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent." Although this result tends to produce *some checkerboarding in non-reservation land*, it is temporary and lasts only until the Indian title is extinguished. 387 F.2d at 287 (emphasis added) [28]

As far as the counties have been able to determine, *Nice, Frank Black Spotted Horse, Kills Plenty*, and *Beardslee*, are the only cases wherein the Eighth Circuit has been presented with a question involving Indian jurisdiction on the Rosebud Reservation. In all four, one cannot read the Court's opinion without concluding that Gregory, Tripp, Lyman and Mellette counties were simply not considered to be within the limits of the Rosebud Indian Reservation.

Secondly, irrespective of how the general issue before this Court is ultimately resolved, there is no question that the court in *Beardslee* correctly interpreted 1151(c) as applying only to non-reservation situations. To this extent, 1151(c) specifically approved checkerboard jurisdiction. The Revisor's note and the House Report stated that "Indian allotments were included in the definition on authority of the case of *United States v. Pelican*". The *Pelican* case specifically held that after a reservation had in fact been diminished, the allotments outside the boundaries of that reservation were still Indian country and would remain Indian Country until Indian title had been extinguished. [29] Yet, in the *Seymour* opinion the following statement appears:

> For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed *within* the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of Section 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid. 368 U.S. at 358 (emphasis added).

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28. Most of the cases cited by appellant below in its brief at 22, 23, were specifically cited *with approval* in the *Beardslee* opinion. Indeed, Judge Blackmun, now Justice Blackmun of the United States Supreme Court, who authored the *Beardslee* opinion, even cited *LaPlant* approvingly. 387 F.2d at 286.

29. 232 U.S. 442 (1913). Revisor's note preceding 18 U.S.C. Section 1151 (1949). *See also* H.R. Rep. No. 304, 80th Cong., 1st Sess. A 92-94. (1947).

Although Justice Black was concerned only with the rejection of checkerboard jurisdiction *within* the boundaries of a reservation, as the italicized portion of his statement indicates, the paragraph is still confusing in this respect: Federal jurisdiction does *not* depend solely upon the existence or nonexistence of a reservation. In the situation described in 1151(c), law enforcement officers will *still* have to "search tract books" and to this extent the "impractical pattern of checkerboard jurisdiction" has *not* been "avoided by the plain language of Section 1151."

In Gregory, Tripp, Lyman and Mellette counties, the law enforcement officers have searched the tract books for years. Until Congress decides otherwise, the counties would prefer to remain "non-reservation lands" irrespective of the temporary inconvenience of the impractical pattern of checkerboard jurisdiction as set forth in 1151(c). This is especially so in light of the alternative: that of being thrust within the boundaries of a reservation which the counties have not been within for over 60 years.

VI. PRIMARY SOURCES

On page 10 of its brief to this Court appellant has stated that the trial court brief of the defendant four counties was "heavily interlarded with *selected* excerpts from documentary material in support of their argument that Congress intended to disestablish the portions of the reservation affected by each of the three surplus land statutes of 1904, 1907 and 1910." B.A. at 10. Appellee would point out that although the excerpts were "selected" and were "in support" of its argument, they were definitely not *selected in support* of the argument as appellant would by innuendo, have this Court believe. Indeed, the very fact that approximately 20 pages of quoted material could be "in support" of our position, as appellant apparently concedes, would seem to shed some light on the plausibility of appellant's position even if it was founded upon the legislative history and surrounding circumstances of the period – which it wasn't below and isn't here.

In the court below, appellee did express the view that the arguments in the briefs to the courts in the *New Town, Moktish*, and *the Federal District Court* in *Condon*, were not founded upon the legislative history and surrounding circumstances and that appellant's brief below contained only similar arguments and was almost similarly silent with respect to *quotations or citations* to legislative history or to any of the surrounding circumstances. Of course appellant in its brief to this Court does cite to its admittedly excellent appendix, but the text of the brief itself discusses the material contained therein *only* in as far as absolutely necessary or where appellant erroneously

assumed it could quote something to its advantage and even these situations were few and far between. Finally, we agree with the appellant that "the search should not be for the remote, or the stretch for the obtuse." B.A. at 13. Certainly the debates in the Congressional Record and the House and Senate Reports on the very acts under construction, do not represent such a quest. As for the other materials, the United States Supreme Court in the *Mattz* opinion cited nearly everything in the briefs in addition to explicitly stating that the "meaning and effect" of acts such as the ones under construction herein "cannot be determined without some reference to the particular "Tribe" and "history of the reservation" prior to the passage of the act. *Mattz, supra.* What other means are available to determine whether or not " a congressional determination to terminate" is clear from the "surrounding circumstances and legislative history" (*Mattz, supra*) or that Congress by "clear implication" has "diminished the boundaries of the reservation." *Condon, supra*

In this respect your appellee would submit that the mass of miscellaneous correspondence of the Department of the Interior is an excellent source from which to ascertain the "surrounding circumstances" of the three Rosebud Acts. Similarly, what better source from which to ascertain precisely what effect the members of the Rosebud Sioux Tribe attributed to the three Rosebud Acts at the time than Inspector McLaughlin's reports, transcripts, and their own correspondence. As Felix Cohen has stated:

> A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a non-technical way as the Indians would have understood the language. . . .Although an interpretation of a treaty should be made in the light of conditions existing when the treaty was executed, as often indicated by its history before and after its making, the exact situation which caused the inclusion of a provision is often difficult to ascertain. New conditions may arise which could not be anticipated by the signatories to a treaty. A practical administrative construction of a treaty which has long been acquiesced in by Congressional inaction is usually followed by the courts. Cohen, HANDBOOK ON FEDERAL INDIAN LAW, ch. 3, Section 2 at 37, 38 (1942).

The "practical administrative construction" to which Mr. Cohen refers can also be determined, unequivocally and precisely by utilizing these same materials. Why must any court rely upon the mere fact that the agency continued to provide some services to those allotted in the opened areas which, by itself, is probative of nothing, as is the unfounded generalization that "certainly, contemporaneous with the statutes and thereafter, the United States did not regard any part of the Rosebud Reservation as disestablished." B.A. at 55, 56, 57. And how can one ascertain the "flavor of the archives material" (B.A. at 59) from this singular annual report of the Rosebud –

especially in light of the earlier reports such as the one of 1909 that were specifically addressed to the issue presented herein:

> The Rosebud agency is located on the southern boundary of South Dakota. *Originally* the reservation extended to the Missouri river on the east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservation, was ceded and the surplus or unallotted lands made available for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and south, known as Tripp County, and *east of the present diminished* reservation was opened to settlement. . . .
>
> What is now known as the *diminished* reservation is a tract about 50 miles square embracing the western part of the original reservation. . . .
>
> If the whole of the *diminished* reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious. . . .
>
> The *diminished* reservation, containing about 2500 square miles, is wholly a cattle range – at present. . . .
>
> The burning of the grass on a great part of Tripp County early last winter found many of the cattlemen's stock to seek grass on the *diminished* reserve. . . .
>
> In order to keep the cattle of the *diminished* reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to *construct* a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended in repairing the fences on the other *three* sides of the reservation this season and they are now in good condition.
>
> All theother day schools are located in the diminished reservation. . . .
>
> Many new towns have sprung up near the reservation boarders and in Tripp County. . . .
>
> C.L. Ellis
> Special Indian Agent
> in charge
>
> Report to the Commissioner of Indian Affairs, Annual Report of the Rosebud Agency, C.L. Ellis, Agent, 21-27 (1909) (emphasis added). . .

Or similar references or quotations. . .ad infinitum.

CONCLUSION

In appellee's words:

> This action seeks declaratory judgement as to the effect of these acts, 1904, 1907, 1910, on the size of the reservation. In truth, the action asks the Court to define for the parties the present boundaries of the Rosebud Indian Reservation. A.P. at 2.

The first part of this brief contains unequivocal probative evidence of the precise effect Congress intended these acts to have on the Rosebud Reservation; the second part contains an evaluation of the applicable case law and appellant's arguments.

The appellee has submitted that the applicable case law should not be construed as a mandate for this Court to disregard the effect, as evidenced by the materials in part one, that Congress intended the three acts to have on the Rosebud Reservation. Similarly, the material in part one was also relied upon to dispose of appellant's argument, a most sophisticated argument to be sure, but not to the degree that it could weather a full exposure to the Rosebud documents.

Admittedly, the method used by Congress to open the Rosebud Reservation was different from the method used by Congress in the 1800's. Nevertheless, with respect to the Rosebud Reservation, the concept of a reservation diminished remained the same and this concept permeates the Rosebud documents of the period. Appellant has not nor cannot produce sufficient material from a Rosebud source prior to 1911 to clearly support its position that Congress did not intend to diminish the Rosebud Reservation by the passage of the three acts. In the absence of such support to counter the intent expressed in the documents presented herein, appellee would submit that just as there was no occasion to continue a reservation larger than Todd County in 1910, there is no occasion to enlarge that reservation today.

The judment below should be affirmed.

APPENDIX

5. Act of Aug. 17, 1911, ch. 22, 87 Stat. 21 (S.3152):

> Be it enacted. . . That any person who has heretofore made a homestead entry for land *in what was formerly a part of the Rosebud Indian Reservation in the State of South Dakota*, authorized by the Act approved March second, nineteen hundred and seven. . .(emphasis added).

6. S. Rep. No. 115, 62nd Cong., 1st Sess., (1911), containing a letter dated August 2, 1911, from Samuel Adams, acting secretary of the Interior to Hon. Charles H. Burke, House of Representatives. Mr. Adams proposed a version of a bill to extend relief to settlers who had entered lands in Tripp County, South Dakota. The proposed bill read in part:

> That any person who has heretofore made a homestead entry in what was *formerly* a part of the Rosebud Indian Reservation in South Dakota, authorized by act approved, March second, nineteen hundred and seven, may apply to the register and receiver of the land office in the district in which the land is located, for an extension of time in which to make payment (emphasis added).

7. 47 Cong. Rec. 3841 (1911):

> Mr. Burke of South Dakota. . .Mr. Speaker, the bill H.R. 13044, which is the bill now under consideration, you will notice, proposes to affect lands in what was *formerly* the Rosebud Reservation and the Cheyenne and Standing Rock Reservations in North and South Dakota. The bill as amended in committee eliminates the Cheyenne and Standing Rock Reservations in North and South Dakota, because of no emergency existing as to those reservations at the present time (emphasis added).

8. 40 L.D. 54 (1911):

> NEWTON DEXTER BURCH.
> Decided April 26, 1911.
>
> ROSEBUD INDIAN LANDS - SOLDIERS' ADDITIONAL RIGHT.
>
> Lands in the *former* Rosebud Indian Reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional right.
>
> PIERCE, First Assistant Secretary:
>
> Newton Dexter Burch has filed appeal from decisions of January 18, 1911, by the Commissioner of the General Land Office, holding for cancellation the final certificate and rejecting his several applications filed on or about October 8, 1909, under sections 2306 and 2307, R.S., for the different subdivisions of the SW ¼ of Sec. 27, T. 101 N., R. 76W., 5th P.M., containing 160 acres, Gregory, South Dakota, land district. The said tracts are a part of the *former* Rosebud Indian Reservation, opened by proclamation of the President, dated August 24, 1908 (37 L.D., 122), under the act of March 2, 1907 (34 Stat., 1230). . .(emphasis added).

9. 40 L.D. 267 (1911):

INSTRUCTIONS.
DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE
Washington, D.C. September 8, 1911.

Register and *RECEIVER*,
Gregory, South DAkota

GENTLEMEN: Your attention is directed to the provision of the act of Congress, approved August 17, 1911, (Public–No. 22), entitled "An act extending the time of payment to certain homesteaders *in* the Rosebud Indian Reservation, in the State of South Dakota," which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land in what was *formerly* a part of the Rosebud Indian Reservation, in the State of South Dakota. . . . .

Very Respectfully,

John McPaul

Approved Samuel Adams
Acting Secretary
(emphasis added).

10. Act of Jan. 11, 1915, 33 Stat. 792:

AN ACT Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, *in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.*

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was *formerly within the Rosebud Indian Reservation* in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands (emphasis added).

11. 52 Cong. Rec. 453 (1914):

Mr. Burke of South Dakota. I will state that this bill originally as introduced, or a similar bill, was limited to *Tripp County, what was formerly part of the Rosebud Reservation* , . .

. . .so that it will be limited to lands in Tripp County, in what *was formerly within* the Rosebud Indian Reservation. . . .

. . .so that the bill will be limited to lands in Tripp County *formerly within* the Rosebud Indian Reservation (emphasis added).

12. 44 L.D. 195 (1915):

TRIPP COUNTY MINERAL LANDS - ACT JANUARY 11, 1915.

INSTRUCTIONS
(No. 425.)
DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE,
Washington, July 15, 1915.

REGISTER AND RECEIVER
United States Land Office
Gregory, South Dakota.

SIRS: 1. The act approved January 11, 1915 (38 Stat., 792), provides that all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, in *what was formerly within the Rosebud Indian Reservation in South Dakota*, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, ...

Very respectfully,

Clay Tallman,
Commissioner.

Approved, July 15, 1915.
A.A. Jones
First Assistant Secretary
(emphasis added).

13. 44 L.D. 325 (1915):

EDITORIAL NOTE

In connection with the foregoing regulations as printed in pamplet form there were added, as an appendix, for information and convenient reference, reprints of the instructions of . . .44 L.D., 195, under the act of January 11, 1915, providing for the purchase and disposal of certain lands containing kaolin, kaloinite, fuller's earth, China clay, and ball clay, in Tripp County, *formerly* a part of the Rosebud Indian reservation, South Dakota (emphasis added).

14. Department of the Interior, Ann. Rep. of the Comm. of the General Land Office, 165 (1916):

Rosebud Indian Lands

Unentered land *within the former Rosebud Indian Reservation in Lyman and Tripp Counties*, South Dakota, were offered for sale to the highest bidders for cash at Gregory, South Dakota, on September 23, 1915. The prices received ranged from $2.50 to $7 per acre. In all 5,763.71 acres were sold for $17,866.07. *All* tracts were sold. The sale was made under authority of the act of March 2, 1907 (34 Stat. 1230), and departmental regulations approved July 28, 1915. . . .

Very respectfully,

Clay Laceman, Commissioner
(emphasis added).

15. 47 L.D. 177 (1919):

REGULATIONS FOR THE SALE OF CERTAIN LOTS IN MINNEOTA TOWNSITE IN THE *FORMER* ROSEBUD INDIAN RESERVATION, TRIPP COUNTY, SOUTH DAKOTA

INSTRUCTIONS
DEPARTMENT OF THE INTERIOR

Washington, D.C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Under the provisions of the act of March 2, 1907 (34 Stat., 1230), you are directed to cause the lots designated from "A" to "S" inclusive in the townsite of Minneota within the *former* Rosebud Indian Reservation, Tripp County, South Dakota, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands at not less than their appraised value on June 14, 1919. . . .

Alexander T. Vogelsang
First Assistant Secretary
(emphasis added).

16. Annual Rep. of the Board of Indian Commissioners to the Secretary of the Interior, Report on the Rosebud Indian Agency, South Dakota, Hugh L. Scott, 28 (1912):

. . .*there are several large towns on what used to be* the old reservation. The largest is Winner, [Tripp County] . . .(emphasis added).

2. 33 L.D. 124 (1904):

Instructions, Department of the Interior,
General Land Office, Washington, D.C.,
July 19, 1904.

Register and Receiver,

Chamberlain, South Dakota.

Sirs: All persons who apply to enter lands within the *former* Rosebud reservation, . . .

W.A. Richard, Commissioner.

Approved: Thom. Ryan
Acting Secretary
(emphasis added).

3. Department of the Interior, Indian Affairs Ann. Rep., Report of the Agent for Rosebud Agency, Chas. E. McChesney, Agent, 334 (1904):

Sir: I have the honor to submit the annual report of this agency for the year ending June 30, 1904):

The Rosebud Reserve embraces about 2,700,000 acres of land, situated entirely within the State of South Dakota, and *extends* from the Nebraska State line on the south to the White River on thenorth and from the Pine Ridge Reserve lines on the*west* to the range line between ranges *73* and *74* west, fifth principal meridian, on the east. All the land *formerly belonging to this reserve east* of the above range line is now open to settlement under an act of Congress passed at the last session thereof. The opened portion includes about 416,000 acres (not counting the Indian allotments) and is the major part of Gregory County, S. Dak. . .(emphasis added).

4. FOURTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1904 III STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 21 (1906):

The State Historical Society takes pride in presenting herewith its Fourth Annual Review of the *Progress* of the State, and congratulates South Dakota upon continued excellent conditions and another year of prosperity and happiness.

Two circumstances, each unique in itself, have made the year notable in this state. The first of these was the opening of a portion of the Rosebud Indian Reservation to settlement, and the remarkable rush of homeseekers who desired to secure locations upon these fertile lands. The section opened by act of congress comprised about 416,000 acres of Gregory County, *off of the east end of the reservation*. . .(emphasis added).

5. C.T. at 4-5 (Dec. 1906):

Inspector McLaughlin: . . .There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments, so you need not worry about that, my friends.

6. YESTERDAY AND TODAY: A HISTORY OF THE CHICAGO AND NORTHWESTERN RAILWAY SYSTEM, at 133 (1910). The following quotation from the annual report for fiscal year *1906* appears therein:

The company had also undertaken the construction of an extension from Bonesteel, South Dakota to Gregory South Dakota, a distance of 25.93 miles, and would be complete during the ensuing fiscal year. This extension will *pass through Gregory County*, which embraces that portion of the Rosebud Indian Reservation opened to settlement in 1904, and will terminate near the *present* eastern boundary of that reservation (emphasis added).

7. 38 L.D. 214 (1909):

First Assistant Secretary Pierce to the Commissioner of the General Land Office, September 20, 1909. . . .

. . . The land embraced in said entry is a part of the *former* Rosebud Indian Reservation opened to entry and settlement August 8, 1904, by proclamation of May 13,1904 . . . .(emphasis added).

8. Department of the Interior, Secretary of the Interior, Ann. Rep. 34 (1917):

Public Sales have been announced to take place during the coming season. . .of unsold lands in the *former* Rosebud Reservation in Gregory County, South Dakota (emphasis added).